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CURRENT EVENTS.

MR. CHIEF JUSTICE FULLER.—The recent confirmation by the senate of Mr. M. W. Fuller as chief justice of the United States, fills the vacancy on the bench of the supreme court, and the *personnel* of that august body is now complete.

There was some opposition to the confirmation of Mr. Fuller, but it is very gratifying that that opposition was not in any degree founded upon objections to his personal or professional character. It was purely political, based upon Mr. Fuller's opinions on certain questions of much moment, but now happily to be reckoned among the dead issues of the past.

We have no doubt that the country and the profession will cordially accept Mr. Fuller as a fit successor of the long line of eminent jurists who have heretofore graced the high position to which he has been called.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION.—In our last number we commented upon the decision of a Kentucky court which held that an act of the general assembly was unconstitutional and void. We now propose to pay our respects to the Ohio legislature, which, in two instances, has, in our opinion, exceeded its constitutional powers. We do not assume to be a censor of legislative or judicial bodies, nor, in any sense, the watch-dog of the constitution. On the contrary, we are especially amenable to authority, and bow readily and gracefully to judicial *dicta*, but we draw the line at constitutional limitations. We have an innate reverence for the organic laws of the country, regarding them as the chief safeguards of all personal and property rights, and freely express our views whenever their availability is impaired. "When you see a head, hit it," is a well established Irish rule of conduct in a shindy, and, metaphorically at least, is worthy to be adopted by legal journalists when the efficacy of constitutional provisions is imperilled. In such case respect for the lawgiver must yield to the greater regard due to the supreme law itself.

The constitution of Ohio, like those of many of the States, prohibits special legislation applicable only to a few persons, to single towns or cities, or to limited districts. To avoid obvious inconveniences from this rule, it has been a general practice to enact laws applicable to municipal corporations, and to limit the operation of such laws to cities having a population exceeding a stated number of inhabitants, or to towns, the population of which does not exceed a stated number of inhabitants. This practice has been regarded as legitimate, and upon its authority the Ohio legislature has resorted to an expedient, more ingenious than ingenuous, which, in our opinion, is thinner than the sheerest muslin that ever came from an India loom. It seems that a certain town in Ohio wanted from the legislature a certain privilege, and rather greedily, wanted it, "all for their own, and none for their neighbors." After consultation of the census table, the bill was drawn up to meet the views of the beneficiary town, and was passed by the complaisant legislature. By it the desired privilege was accorded to all towns having, by the census of 1880, a population not less than 4,040 inhabitants, and not more than 4,045 inhabitants.

Another act by the same legislature gave a different privilege to all towns the population of which, by the same standard, was not less than 887 and did not exceed 890 inhabitants. Of course, everybody knew what towns were to be profited by the act as well as if their names had been printed in the body of the act.

Now, upon this subject we wish to make, as clergymen sometimes say, a few remarks. The provision of the constitution thus set at naught by the legislature is not of vital importance, indeed, it is very possible that even if it were altogether abrogated, the State of Ohio might still survive and even flourish for many years. The evil is not in what has been done, but in what, upon the same *no* principle, may hereafter be done. If a provision of the constitution can so easily be subordinated to local interests far more im-

portant objects may be sought and more powerful agencies be put in motion to abrogate more vital provisions, and the facile rule of interpreting legislative duty inaugurated by these acts may well be expected to produce disastrous consequences. We are curious to know what the Supreme Court of Ohio will have to say on so palpable a perversion of constitutional obligation. A distinguished gentleman in England once said that he could drive a coach-and-four through a certain act of parliament. If this line of constitutional interpretation shall receive judicial sanction, it will be very easy to drive not merely a Conestoga wagon, but a train of loaded cars through any section of the constitution of Ohio.

NOTES OF RECENT DECISIONS.

EQUITY—CONTRACT FOR SALE OF CHATTELS—SPECIFIC PERFORMANCE. — The Maryland Court of Appeals recently decided a case[1] in which was applied the well known doctrine of equity, that specific performance of a contract for the delivery of chattels will be decreed where there is no adequate remedy by action at law. The contract was for the purchase of certain notes of Weiller & Son, an insolvent firm, for $7,500, for which plaintiff agreed to pay $3,000. The court held that because it was wholly uncertain what the amount might be which could be collected upon the notes, damages for the non-performance of the contract could not be a sufficiently certain and adequate satisfaction. The court stated the rule applicable in cases in which delivery of chattels will be decreed in equity as follows:

"In the language of Lord Selborne, 'the principle which is material to be considered is that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice,'[2] or, in other words, where damages at law fall short of that redress to which one is fairly and justly entitled."[3]

[1] Gottschalk v. Stein, Md. Ct. App., April 18, 1888; 25 Rep. 590, 13 Atl. Rep. 625.

[2] Wilson v. Railway Co., 9 Ch. App. 279.

[3] Doloret v. Rothschild, 1 Sim. & S. 590; Buxton v. Lister, 3 Atk. 385; White v. Schuyler, 1 Abb. Pr. (N. S.) 300; Ashton v. Corrigan, L. R. 13 Eq. 76; Robinson v. Cathcart, 2 Cranch C. C. 590; Cutting v. Dana, 25 N. J. Eq. 265.

The court, after further remarks upon the facts of the case, says:

"And then again, in Adderley v. Dixon,[4] where the plaintiff, being entitled to a dividend in two bankrupt estates, agreed to sell the claim for 2s. and 6. in the pound, Sir John Leach, vice-chancellor, said: 'Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. The present case being for the sale of uncertain dividends which may become payable from the estate of the two bankrupts, it appears to me that upon the principle established by the cases of Ball v. Coggs,[5] and Taylor v. Neville,[6] a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel the purchaser to take such damages would be to compel him to sell the dividends at a conjectural price."

[4] 1 Sim. & S. 607.

[5] 1 Brown, Parl. Cas. 140.

[6] Cited in 3 Atk. 384.

ARGUMENT TO JURY IN CRIMINAL CASES.

Two recent cases suggest an inquiry into the conduct of arguments to the jury in criminal cases.

In the case of Newman v. Commonwealth[1] it was held that, under an indictment, charging defendants with conspiracy against the employees of certain coal operators, to compel them to quit working by force of threats or menaces of harm, the exhibition by the counsel for the prosecution as part of his argument to the jury of a caricature from *Puck*, entitled "Suckers of the Workingmen's Sustenance," under permission of the court, was not ground for reversing a judgment of conviction. The court, in a *per curiam* opinion, said:

"With reference to the exhibition of the picture, exhibited by the counsel for the prosecution as part of his argument to the jury, we cannot say that the court was wrong

[1] 5 Cent. Rep. 497 (Pa.).

in permitting it. Things of this kind are very much a matter of discretion, and we are not disposed to review them unless we are satisfied that some serious wrong has been done."

This decision was perhaps based upon a civil case,[2] cited by counsel for the commonwealth, but not referred to in the opinion of the court in which it was held that an engraving may be used before the jury, to illustrate the positions of counsel or the statements of a witness, as well as a sketch made by pen or pencil or in any other way, unless the court can see that there is something about it that is calculated to mislead the jury.

The other case above referred to is Heil v. State[3] which was a prosecution for larceny, and the prosecuting attorney was held not to have transgressed the privilege of fair debate because he referred to recent riots in Cincinnati and the burning of the court house by a mob, assigning as a cause the lax administration of criminal law in that city. The court saying: "The remarks alluded to above had reference to an historical event, concerning which the jury were supposed to be familiar, both in respect to its occurrence and the causes to which it was attributed. As there was no allusion made to the defendant in that connection, or to his being in any manner concerned in the riots, we cannot say that the privileges of fair debate were transgressed."

Counsel for appellant cited in his argument before the supreme court the case of Ferguson v. State,[4] which was not referred to in the opinion filed by the supreme court and in which it was held that on the trial of an indictment for murder, it was error for counsel for the State, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon.

These cases may be regarded as extreme and of very doubtful propriety, since it is very probable injury resulted to the defendants by such incendiary harangues, and the judgments of the courts seem to be practical denials of fair trials upon the evidence.

On examination, the decisions do not generally appear to permit such latitude in argument, while the cases do seem to support rules sufficiently broad to insure the conviction of any defendant against whom there is any competent evidence and to amply protect the rights of society.

In the adjucated cases, vituperation and irrelevancy have frequently been permitted; but in no other decisions do we find sanctioned the use of inflammatory harangues referring to furious mobs about to burn court houses and perhaps cremate the jury unless deterred by the entry of a conviction of the defendant for larceny, or the use of highly colored pictures of misguided coal miners robbed of the wages of their toil by labor-reform suckers.

A caricature in the same journal, entitled the "tattooed man," is supposed to have had a marked effect upon the national campaign of 1884; yet the court assumed that the "suckers of the workingmen's sustenance" had no effect upon the susceptible minds of a quarter sessions jury.

If it is not required to confront the accused by the witnesses against him, and if, outside of the evidence, dramatic influences without limit may be introduced to terrify stupid jurors or to incite them to make an example of the accused, why mihgt the district attorney not have attached to his office an artist with an official red pencil or employ his office boy to make stage thunder while he exclaimed to the jury "Hear the howling of the mob!"

Fair trials seem often denied by our courts, when one considers the strictness on the one hand with which technical questions of practice have been applied in recent cases involving liberty and life; refusals to consider appeals upon their merits for failure to present exactly the points in the courts below at precisely the right time, the frequency with which it is held that important questions and rights have been waived by the accused, even in capital cases, where the accused is often, by reason of ignorance, poverty or the appointment of the judge, represented by counsel who ought to be considered incapable of

[2] Ordway v. Haynes, 50 N. H. 159.
[3] 8 West. Rep. 393 (Ind.).
[4] 49 Ind. 33.

waiving any rights of their unfortunate clients; and on the other hand the unfairness encouraged in the prosecuting attorney's conduct of the trial.

Such decisions rather incite mobs, and judicial approval of "caricatures of the suckers of the workingmen's sustenance" rather lessen popular confidence in trials between coal barons and workingmen and go some way to justify the recent expressions in the congressional debates concerning the inefficacy of *quo warranto* and other similar procedings in State courts.

The increasing tendency in criminal procedure to deny reversals for irregularities and on the other hand to require the accused to present his defense with technical strictness, should be accompanied by more stringent regulations requiring fairness in the conduct of prosecuting attorneys and excluding matters for which the individual defendant is not answerable.

We will attempt to ascertain some of the limits of fair argument as determined by the decisions, particularly the more recent ones.

General Rules.—The conduct and management of the argument on the trial of either a civil or criminal prosecution is largely within the discretion of the trial court, and it is only when some abuse of this discretion, to the probable injury of a party, is shown, that an appellate court will interfere.[5]

The allowance of an improper or irrelevant couse of argument is no ground of exception, without showing that the jury were erronously instructed as to the weight to be given to it.[6]

But it may be laid down as law, and not merely discretionary, that when counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there, and if he fails to do so, and the impropriety is gross, it is good ground for a new trial.[7]

It is the duty of the presiding judge to interfere of his own motion to prevent a breach of the privilege of counsel, and if he fails to do so, and the abuse produce the conviction so that injustice resulted therefrom, it is the duty of the appellate court to award a new trial.[8]

Within the limits of the testimony the arguments of counsel should be free; but that freedom does not extend either to the staement or assumption of facts or to commenting on facts not in evidence, to the prejudice of the adverse party. When counsel are permitted to state facts not in evidence and to comment upon them, the usage of the court regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied.[9]

In the case of State v. Jackson, decided by the Supreme Court of Missouri on June 4, 1888, not yet reported, the district attorney made references to mobs and lynch law, which were deemed sufficient cause for reversal, the court saying:

"In State v. Kring, 64 Mo. 591, the circuit attorney made the following remarks: 'If you wrong the accused by finding him guilty, that wrong can be righted, because there are two courts above this in which the accused can have this reversed—the court of appeals and the supreme court. If you are not justified in finding this man guilty, it is in their power to rectify any error; while if, on the other hand, you turn the murderer loose in the community, no matter how frail might be the

[5] "Misconduct of Counsel in Argument," by W. F. Elliott, Esq., 16 Cent. L. J. 406; Morgan v. Hugg, 5 Cal. 409; Duffin v. People, 107 Ill. 113; Lafayette v. Weaver, 92 Ind. 477; Epps v. State, 102 Ind. 539, 1 N. E. Rep. 492; Shular v. State, 105 Ind. 289, 3 N. E. Rep. 870; Scripps v. Reilly, 35 Mich. 371; State v. Hamilton, 55 Mo., 520; Rehberg v. Mayor, 99 N. Y. 652, 2 N. E. Rep. 11; Kaime v. Trustees, 49 Wis. 371, 5 N. W. Rep. 838.

[6] Commonwealth v. Byce, 8 Gray, 461.

[7] Dickerson v. Burke, 25 Ga. 225; Ferguson v. State, 49 Ind. 33; Proctor v. DeCamp, 33 Ind. 559; State v. Guy, 69 Mo. 430; Jenkins v. N. C. Ore Dressing Co., 65 N. C. 563; Devries v. Phillips, 63 N. C. 53; State v. Underwood, 77 N. C. 502; Coble v. Coble, 79 N. C. 53; 589; Hilliard on New Trials, 225.

[8] Berry v. State, 10 Ga. 511; Saunders v. Baxter, 6 Heisk. 369; Perkins v. Guy, 55 Miss. 153; Cavanah v. State, 56 Miss. 209; Martin v. State, 63 Miss. 505.

[9] Proffatt on Jury Trials, § 250; Cross v. State, 68 Ala. 476; Wolffe v. Minnis, 79 Ala. 386; McNabb v. Lockhart, 18 Ga. 495; Dickerson v. Burke, 25 Ga. 225; Bill v. People, 14 Ill. 432; Kennedy v. People, 40 Ill. 489; Yoe v. People, 49 Ill. 410; Hennies v. Vogel, 66 Ill. 401; Read v. State, 2 Ind. 438; Ferguson v. State, 49 Ind. 33; Combs v. State, 75 Ind. 215; Morrison v. State, 76 Ind. 335; Proctor v. DeCamp, 83 Ind. 559; Bessette v. State, 101 Ind. 85; Epps v. State, 102 Ind. 539; State v. Anderson, 104 Ind. 467, 1 West. Rep. 175; Brow v. State, 103 Ind. 133, 2 N. E. Rep. 296; People v. Dane, 59 Mich. 550, 26 N. W. Rep. 781; Perkins v. Guy, 55 Miss. 153; Cavanah v. State, 56 Miss. 299; State v. Lee, 66 Mo. 165; State v. Jackson (Mo.), decided June 4, 1888, not yet reported; Bohanan v. State, 18 Neb. 57, 24 N. W. Rep. 391; Tucker v. Henniker, 41 N. H. 317; State v. Smith, 75 N. C. 306; Union Ins. Co. v. Cheever, 36 Ohio St. 201; Cartwright v. State, 16 Tex. App. 473; Brown v. Swineford, 44 Wis. 282.

scaffolding, it takes him forever in the light of freedom again; you will make a wound in this community that will never be healed.'

"Passing upon these remarks, this court said: 'The statement that the higher courts referred to had the power to review the finding of the jury on the weight of evidence was calculated to induce the jury to disregard their responsibility. * * The judge presiding at the trial, in our opinion, should not have permitted such remarks to be made, on the close of the argument, without a prompt correction.'

"The only difference between the case referred to and the one at bar is that in the former an attempt was made to induce the jury to find a verdict of guilty upon the ground that if they committed any error it would be corrected by an appellate court, while here a similar attempt was made to induce a verdict of guilty, by an intimation amounting almost to a covert threat that, if they failed to find a verdict of guilty, their error would be corrected by an outside tribunal acting independently of, and in defiance of, all law.

"Language fails to express in terms sufficiently strong the condemnation which should always promptly attend the utterance of such unworthy words, when a human being is on trial for his life before a tribunal organized for the purpose, and for the sole purpose of administering the law."

If counsel, in summing up, misstate the evidence to the jury, the court below may grant a new trial; their refusal to do so is however not the subject of review upon a writ of error.[10]

The rule is stated in Shular v. State[11] If counsel go beyond the evidence and bring in foreign and unproved matters, courts should interfere, and if the trial court does not interfere, and the matter improperly brought before the jury is of a material character, the court may reverse the judgment. But it is not every vlolation of the rules governing the discussion of cases before the jury that will entitle the complaining party to have the verdict set aside; for, if the statement be an unimportant one or one not likely to wrongfully influence the jury, the verdict will be upheld."

[10] Thompson v. Barkley, 27 Penn. 263.
[11] 2 West. Rep. (Ind.).

And in Combs v. State[12] it is said: "To rigidly require counsel to confine themselves directly to the evidence would be a delicate task both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence which are likely to do the accused injury, it should be deemed an abuse of discretion and a cause for reversal, but when the statement is a general one and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal."

A statement by the county attorney that "the defendant had been guilty of one offense, and would commit a greater offense to cover the other up" which was not objected to, held not ground for new trial, it not appearing whether reference was intended to the offense on trial or some other offense.[13]

In a trial for murder, the district attorney referred to another man convicted of murder, then in jail, who should be released, if no conviction should be found in this case, held ground for reversal.[14]

Abusive Language; Exciting Prejudice.—To make vituperation and abuse, grounds for reversing a judgment, it must appear that the remarks were grossly unwarranted and improper; that they were of a material character and calculated injuriously to affect the defendant's rights.[15]

Where the county attorney, in his closing address, said, "the defendant in this case has stooped so low as to drag before you the infidelity of his dead wife, and publish her before the court house as a prostitute." The court held this language not cause for new trial, remarking, "We cannot deny that this remark was unfair. A defendant has a right unquestionably to introduce all such matters of defense as are admissible and calculated to mitigate, excuse, or justify his actions, and while the prosecuting officer has a right

[12] 75 Ind. 221.
[13] State v. McCool, 34 Kan. 613, 9 Pac. Rep. 618.
[14] Newton v. State, 21 Fla. 53.
[15] Pierson v. State, 18 Tex. App. 524.

to comment upon the nature and character of such defenses, still in doing so it is most improper to denounce and villify him on account of his defenses." [16]

Counsel for defendant stated that he could personally sustain the general reputation of the defendant. Thereafter the prosecutor said that he had personal knowledge that the defendant was reputed to be a hotel thief, and that he had been published and portrayed in the *Police Gazette* as such. The court held that the speech of the prosecutor went beyond the bounds of propriety; but that the evidence in the record fully sustaining the verdict, refused to grant a reversal.[17]

In the opening address the prosecuting attorney called defendant a "dirty dog" and stated that in separating the prosecuting witness from her companions he acted "like a dirty dog as he was." The court refused to grant a new trial, saying: "It was, strictly speaking, a breach of professional decorum to apply opprobious epithets to the appellant in advance of the introduction of any evidence from which disparaging inferences might have been drawn, and the circuit court would have been justified in restraining the prosecuting attorney from the use of such epithets in a merely opening statement; but the breach of professional decorum thus involved, ought not to be regarded as of sufficient importance to cause a reversal of judgment;" [18] and this is said in a case where the court admits "there is room for grave apprehension that the jury may have made a mistake in the conclusion at which they arrive."

The prosecutor may comment on the appearance of defendant in giving his testimony.[19]

In a prosecution for murder, to refer to defendant as, "a murderer" is not ground for reversal.[20]

Where defendant's character had not been impeached but a witness for plaintiff had been contradicted by a witness for defendant, counsel said "that no man who lived in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the Upas tree, shedding pestilence and corruption all around him," it was held ground for new trial.[21]

The prosecuting attorney said, "that saloon keepers always had a gang organized to swear them through, and the jury should not believe a saloon keeper under oath; that only a short time ago a saloon keeper had sold liquor to a man and made him drunk and he froze to death. That he knew personally the saloon keeper in the case, and that he was guilty of this, and he was sure of other crimes." This language the court held ground for a new trial, remarking; "The constitution guarantees to every person accused of crime a right to meet the witnesses against him face to face, but the guaranty stands for nothing, if after the evidence is closed, the State may avail itself of the personal knowledge of the prosecutor concerning the defendant's guilt not only of that, but of other crimes, conveyed to the jury accompanied with statements, ingeniously contrived to excite their prejudice against him. If a conviction is had, in any case, it is essential that it should have been secured according to the facts in the case legally produced to the jury, agreeably to established rules in judicial proceedings, and not by methods which afford the accused no opportunity of meeting the assertions made by anyone claiming to have personal knowledge of his character of guilt." [22]

In the second trial of the case, the pubiic prosecutor denounced the defendant as a "fellow" and a "land thief" and "as guilty as hell" and asserted that the new trial had been obtained "by a dodge and technicality" boasting of his ability to convict him as many times as he could get a new trial. A new trial was granted although the trial judge admonished the jury to disregard the language.[23]

In a murder trial, the prosecutor said, "Defendant is a man of bad, dangerous, and desperate character, but I am not afraid to denounce the butcher boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." Held ground for reversal.[24]

[16] Pierson v. State, 18 Tex. App. 524.
[17] Heil v. State (Ind.), 8 West. Rep. 393.
[18] Anderson v. State, 104 Ind. 466, 2 West. Rep. 341; 4 N. E. Rep. 63.
[19] Huber v. State, 57 Ind. 341.
[20] State v. Griffin, 3 West. Rep. 820; 89 Mo. 49.
[21] Coble v. Coble, 79 N. C. 589.
[22] Brow v. State, 103 Ind. 133, 1 West. Rep. 180.
[23] Hatch v. State, 8 Tex. App. 416.
[24] Martin v. State, 63 Miss. 505.

The county attorney used the following language: "This defendant is a contemptable and pusillanimous puppy. He comes into this court with the swaggering insolence of a grocery bully, and pleads not guilty to the charge. During the dead hours of night, while his family were at their humble home shedding tears of regret over the sad downfall of the husband and father, the man, this biped is bedding up with these prostitutes. Had I the command of language to stand here and express my contempt of this thing, I could stand until the dawn of the resurrection day, and then say less than he merits. If I were going to establish a hell on earth, and invade the realms of darkness for one to supervise it, I would leave there and come back here and take defendant, for he is a fair representative of the devil. Held ground for new trial.[25]

Knowingly and persistently propounding irrelevant and impertinent questions for the purpose of prejudicing the jury may afford ground for reversal.[26]

Where at the close of the opening address persons in the court room applauded and in his closing argument the prosecuting attorney alluded to and approved it and the court neither checked the audience or cautioned the jury, held ground for new trial.[27]

Reference to Omission to Testify and Former Trials.—Where the prosecuting attorney, refers to the fact that defendant has not testified in his own behalf, the defendant is entitled to a new trial.[28]

By statute in Missouri the defendant in a criminal case may become a witness in his own behalf as to such matters as he may choose.

In State v. Graves, decided June 4, 1888 (to be reported in 15 West. Rep.), the court decided it was reversible error for the district attorney to comment upon the omission of defendant to testify in regard to other matters.

Reference to the fact that the defendant did not testify, while matter for objection at the time is not a cause for taking the case from the jury.[29]

[25] Stone v. State, 22 Tex. App. 185.
[26] Alexander v. State, 21 Tex. App. 606.
[27] Cartwright v. State, 16 Tex. App. 473.
[28] Long v. State, 56 Ind. 182; State v. Ryan, 70 Iowa, 54; Commonwealth v. Scott, 123 Mass. 239. Commonwealth v. Worcester, 141 Mass. 58, 2 N. Eng. Rep. 38. As to the right of district attorney to comment upon the absence of one of defendant's former witnesses, see Woodward v. Leavitt, 107 Mass. 453; Commonwealth v. Harlow, 110 Mass. 411; Learned v. Hall, 133 Mass. 417.

Reference to a former trial is improper but if the court checks the reference and the speaker immediately desists, it is not ground for new trial.[30]

Where the prosecuting attorney said: "Will you believe this man, this person, who has told so many lies, and who has just seen the shadow of the gallows," it was held not so distinct a reference to a verdict upon a former trial, as would require a reversal.[31]

Time of Objecting.—To raise the question in the appellate court, it is generally held necessary to make objection and save an exception in the trial court.[32]

It is too late to object to remarks in argument, for the first time in motion for a new trial.[33]

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[30] Petite v. People, 8 Colo. 518, 9 Pac. Rep. 622.
[31] Boyle v. State, 2 West. Rep. 788; 105 Ind. 469.
[32] Gillooley v. State, 58 Ind. 183; State v. Watson, 63 Maine, 128; Commonwealth v. Worcester, 141 Mass. 58, 2 N. Eng. Rep. 38; Bradshaw v. State, 19 Neb. 644, 22 N. W. Rep. 361; Bohanan v. State, 18 Neb. 57, 24 N. W. Rep. 391; McLain v. State, 18 Neb. 154, 24 N. W. Rep. 720.
[33] State v. Forsythe, 89 Mo. 667, 6 West. Rep. 438.

WHAT CONSTITUTES ADVERSE POSSESSION—LIMITATION OF ACTIONS—ACTS AFTER TITLE ACQUIRED.

RIGGS V. RILEY.

Supreme Court of Indiana, January 27, 1888.

The defendant and his grantors had continuously occupied land extending to a fence built by his remote grantors, and claimed throughout that it was the dividing line and cultivated it under a continuous claim of ownership for more than twenty years. A subsequent survey was made without his objection, and he afterwards paid rent for two years to the plaintiff who had a paper title: *Held*, that this did not defeat his title already gained by adverse possession, and ejectment would not lie by one having the paper title.

HOWK, J., delivered the opinion of the court:

In this case errors are assigned here by appellant, Riggs, defendant below, which call in question (1) the court's conclusion of law upon its special finding of facts; (2) the overruling of his motion to make such special finding of facts more specific and full; (3) the overruling of his motion for a *venire de novo*; and (4) the overruling of his motion for a new trial.

The trial court found the facts of this case substantially as follows: On August 20, 1838, Ann

Peters entered and received a patent from the United States conveying to her the W. half of the N. W. quarter of section 6, in township 17 N., of range 9 E., in the district of lands subject to sale at Indianapolis, Indiana, containing 92.94 acres. She afterwards, in 1846, having theretofore married Joseph Montgomery, died intestate, leaving as her only heirs at law, Joseph, Mary A., John Servilla, Samuel S., and Catherine Montgomery, and Elizabeth, intermarried with Charles G. Stokes. On February, 15, 1864, her said heirs executed their warranty deed to John and Josiah Hodson, conveying to them all such real estate. On February 25, 1864, Josiah Hodson and Margaret, his wife, executed their deed, conveying to John Hodson the undivided one-half of such land, and John Hodson remained the owner of all such land until his death, in 1883. In partition proceedings between his heirs, at the February term, 1884, of the court below, the aforesaid land was assigned and set off to plaintiff, Delilah H. Riley, daughter of said John Hodson, as her share of all the lands of which her father died seized. On August 1, 1839, one Benaiah Riggs entered and received from the United States a patent for the W. half of the S. W. quarter of the same section, township, and range, containing 84.76 acres. In 1866, Benaiah Riggs conveyed such land to his wife, Melissa, during her natural life, and the remainder to his children, Joshua, Margaret, Ellen, Greenbrier, George W., Mary J., Jonathan, Emma, James, and Absalom Riggs, in fee-simple. In 1873, Melissa Riggs died, and in the same year, but after her death, the above-named grantees in the deed from Benaiah Riggs conveyed their interest in such land to defendant, Benjamin F. Riggs. The dividing line between these two tracts of land had never been marked or designated by any monument, until about 1848, at which time Benaiah Riggs procured a line to be surveyed by one Balingall, who, at the request and by the procurement of said Benaiah Riggs, located the dividing line between the two tracts of land above described, and entered in the surveyor's records of Henry county a record of his survey. Balingall was at the time acting as surveyor of Henry county, and he planted a stone at west end of said line, and lettered it. At the time such survey was so made, said heirs of Anne Montgomery were the owners of the land previously owned by her, and were not residents of Henry county, and had no interest in said survey, and were not present when it was made, and were not parties thereto. In 1849, or about the time said Benaiah Riggs, who was then living on the land entered and owned by him as aforesaid, built a rail fence substantially on the line so surveyed and located by said Balingall, commencing at the west end of such dividing line, and running thence about 40 rods. The land then owned by said Montgomery was in a wild and unimproved state, being uninclosed and unoccupied, except that a portion of said land, on the south end of said tract, has been deadened. Said fence has remained upon said line from the time of its erection until the commencement of this suit. In 1849, or about that time, said Benaiah Riggs cleared his land up to said fence, and for each year thereafter, including 1849, he plowed and cultivated said land up to said fence, and claimed the same as his own; and he conveyed the tract of land so entered by him, by the description aforesaid, to his wife and children aforesaid, in 1866. In August, 1870, one Noah Hayes, acting as deputy surveyor of Henry county, resurveyed said tracts of land, and entered upon the records of the surveyor of such county a record of such resurvey. It does not appear what notice, if any, was given of this survey, or who were present and participated therein. Melissa Riggs, widow of said Benaiah, who was in possession of said land in virtue of her life-estate therein, continued to occupy such land up to the fence built by said Benaiah Riggs, as aforesaid, until a short time after said survey was made by Noah Hayes, and up to her death. After she died, the defendant became the owner of the land by the conveyance aforesaid, he, during 1873 and 1874, paid said John Hodson a part of the crops raised on the land between such fence and the line established by Noah Hayes, south of such fence and the line established by said Balingall, as rent for the use and occupation of said strip of ground. Since 1874 defendant has not paid rent for such strip of ground, and has continued to hold and occupy the same, and claimed to be the owner thereof, in his own right. Benaiah Riggs, and those claiming under him, have continuously and uninterruptedly occupied said strip of ground up to said fence, claiming to be the owners thereof, and claiming said fence to be the dividing line between said lands, with the exception of the years 1873 and 1874 aforesaid, during which years defendant paid rent for said strip of ground as aforesaid. In April, 1884, plaintiff procured the county surveyor of Henry county to survey said dividing line between the lands above described, and served notice on defendant of the time when said survey would be made. Said county surveyor did survey and locate said line, and entered said notice and his proceedings thereunder, and his said survey of said lands, of record in the record of surveys of Henry county, on the thirtieth day of March, 1885. Said survey has not been appealed from.

Upon the facts found as aforesaid, the court stated the following conclusions of law:

"I conclude, as a matter of law, that the law upon the foregoing facts is with the plaintiff, and that she is entitled to recover possession of the land in controversy, extending to the dividing line between said lands, as located and established in and by the last survey above mentioned, of the county surveyor of Henry county.

[Signed] MARK E. FORKNER, Judge."

Over defendant's exceptions to such conclusions of law, and his several motions to make the special finding of facts more specific and full, for a

venire de novo, and for a new trial, the court rendered judgment that plaintiff recover of the defendant the real estate in controversy, and her costs in this action expended. Plaintiff sued in ejectment to recover the possession of a strip of land 5 rods and 16 links in width, and 60 rod in length, of the tract of land first described in the special finding of facts.

The facts found by the trial court show very clearly that the plaintiff had a complete paper title to the strip of land described in her complaint. We are of opinion, however, that the court's conclusion of law in plaintiff's favor is not authorized by the finding of facts, and cannot be sustained. The question for decision in this case was not, where is the true dividing line between the two tracts of land described in the special finding of facts? If that had been the question for decision, the last survey made by the county surveyor, which seems to have been the only one made in conformity with the requirements of our statute, would have been at least *prima facie* evidence, and, if not appealed from, may become conclusive evidence of the true location of such dividing line as between the parties to such survey, and all persons claiming under them. Section 5955, Rev. St. 1881; Herbst v. Smith, 71 Ind. 44. Upon the issues joined in this cause, the question for decision was this: Is plaintiff the owner, and entitled to the possession, of the strip of land in controversy? Upon this question the plaintiff had, of course, the burden of the issue, and could only recover, if she recovered at all, upon the strength of her own title, and the weakness of defendant's title, or his want of title, would afford her no ground of recovery. Castor v. Jones, 107 Ind. 283, 6 N. E. Rep. 823. The facts found by the trial court clearly show, we think, that defendant owned and held possession of the strip of land described in the complaint herein, by and under a perfect title, equal in all respects to a conveyance in fee, notwithstanding the chain of plaintiff's paper title thereto was apparently unbroken. Thus the court found as facts that from 1849 down to 1873, a period of 24 years, Benaiah Riggs, and those claiming under him, had continuously and uninterruptedly occupied said strip of ground up to the fence, claiming to be the owners therof, and that such fence was the dividing line between said tracts of land; that in 1849 said Benaiah built said fence, and cleared the land up to said fence; and for each year thereafter, including 1849, he plowed and cultivated said strip of land up to said fence, and claimed the same as his own. These facts show such an actual, open, continuous, uninterrupted, exclusive, and adverse possession of such strip of land, for more than 20 years, as extinguished the title thereto by those under whom plaintiff claims, and conferred an absolute and perfect title to such land, in fee-simple, upon Benaiah Riggs and those claiming under him. Bowen v. Preston, 48 Ind. 367; Roots v. Beck, 109 Ind. 472, 9 N. E. Rep. 698, and cases there cited; State v Bank, 106 Ind. 435, 7 N. E. Rep. 379.

The further fact found by the court, that in the years 1873 and 1874 defendant paid rent for such strip of land to John Hodson, would not operate to defeat the defendant's title, nor to convey to Hodson any new title, or to revive his former title to such land. School Dist. v. Benson, 31 Me. 381; Roots v. Beck, *supra*. In truth, the case made by the special finding of facts, as it seems to us, lends no support whatever to the court's conclusion of law thereon. It cannot be correctly said that the survey made in April, 1884, 35 years after Benaiah Riggs built his fence and cleared and plowed the land in controversy, had any effect to defeat the title to such land, which he and those claiming under him had acquired by an adverse possession of the land for more than 20 years, or to confer on the plaintiff herein any title to such land. In Cleveland v. Obenchain, 107 Ind. 591, 8 N. E. Rep. 624, the court said: "A land owner, who submits to a survey, does not, by so doing, lose any of his land. In submitting to a survey, he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey, he does not put himself in the position of surrendering his land, or any part of it."

We are of opinion, therefore, that the trial court erred in its conclusion that the law of this case, upon the facts found, was with the plaintiff, and that its conclusion of law ought to have been a finding for defendant. The judgment is reversed with costs, and the cause is remanded, with instructions to the court to restate its conclusion of law in accordance with this opinion, and render its judgment accordingly.

NOTE.—When title is claimed by adverse possession for the statutory period, it should appear that the possession had been actual, continued visible, notorious, distinct and hostile.[1] The mere placing of rails for a fence upon land is not sufficient evidence of possession to establish an adverse claim. The possession necessary in such cases must be adverse to the claim of all others, and accompanied by an actual possession exclusive in its character.[2]

When the owner of one of two adjoining tracts of land, without an intention of claiming or occupying beyond the boundaries of such tract incloses with it a portion of the other, the possession so held is not adverse to the true owner, and although held for more than ten years, will not support a plea of the statute of limitations to an action by such owner. The court said: "The fact that the defendant has held possession of the property for more than ten years it must be admitted is established without any conflict. But under the instructions and law as we understand it, such fact alone is not sufficient. In Angell on Limitations p. 388, it is said: But if the jury return a verdict only that the defendant has held quiet possession of the demanded premises for more than twenty years, such verdict cannot, by legal intendment, be considered as

[1] Sparrow v. Hovey, 44 Mich. 63; Onley v. Gardener, 4 M. & W. 500; Tickle v. Brown, 4 A. & E. 369; Dowling v Hennings, 20 Md. 184.

[2] Richards v. Smith, 4 S. W. Rep. 571.

establishing the alleged fact of disseisin." Under the evidence the jury may well have found that the defendant inclosed and held possession of the strip in controversy, believing that it formed a part of the northeast quarter of section 22 which he owned, and that he did not intend to assert any claim to it if it did not, in fact, constitute a part of that quarter section. Such a possession this and other courts have held does not bar the action of the real owner."[3]

Possession to be considered adverse must be held with an intention to claim title, and where a party in possession brings an action and recovers back his purchase money for a failure of his title, such act is an abandonment of the claim of title under which he holds possession, and he cannot afterwards claim that such possession is adverse to the title of the true owner.[4]

Where a person took possession of 80 acres of land under a deed which conveyed only an undivided interest to him, the facts that he paid the taxes, broke the land, fenced it, erected a house and other buildings, rented the place for six years and collected the rents, and afterwards occupied it as a homestead, keeping the taxes paid, the heirs who claim an undivided interest not making any claim for twenty years, during which time he had possession, held sufficient evidence, there being no testimony to the contrary that the person in possession supposed that he was the owner, and that his possession was adverse as against his cotenant.[5]

Actual occupancy by residence, cultivation or inclosure, or the erection of permanent improvements is not required in order to establish title by adverse possession, and that whether in any case title has been acquired by length of possession and to which extent and within what limits, must be determined by actual facts.[6]

Where a defendant in ejectment shows the payment of all taxes on the land under color of title for seven consecutive years, while the land was vacant and unoccupied, and he is found or shown to be in possession when the action was brought, it will be presumed that his possession was under color of title, especially when that fact was not disputed on the trial.[7]

An instruction that adverse possession might be predicated on the exercise of facts of ownership, control and dominion is erroneous, when applied to unimproved prairie land.[8] Exercising that dominion over the thing and taking that use and profit it is capable of yielding in its present state is a possession. Such acts to be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser.[9]

Although the original entry may be made in subordination to the title of the real owner, the possession may become adverse by acts and declarations of the occupant, showing his claim to hold adversely when such acts and declarations are brought within the knowledge of the owner.[10]

[3] Skinner v. Crawford, 54 Iowa, 119; Warren v. Jacksonville, 15 Ill. 256; Garrett v. Jackson, 20 Pa. St. 331; Pue v. Pue, 4 Md. Ch. Dec. 386; Hoy v. Sterrett, 2 Watts, 327; Ashley v. Ashley, 4 Gray, 197; Arbuckle v. Ward, 29 Vt. 43.

[4] Davenport v. Sebring, 52 Iowa, 364; Todd v. Todd (Ill.), 7 N. E. Rep. 585; Manning v. Smith, 6 Conn. 289.

[5] Laraway v. Larne, 63 Iowa, 407.

[6] Cooper v. Morris (N. J.), 7 Atl. Rep. 427.

[7] Holbrook v. Gouveneur, 114 Ill. 623; Hayne v. Osborn (Mich.), 28 N. W. Rep. 821, and note.

[8] Brown v. Rose, 55 Iowa, 734; 48 Iowa, 281.

[9] Baum v. Club, 2 S. E. Rep. 673.

Occupation of land by city for market purposes is not a public easement but a proprietary occupation, and private adverse rights will be barred by the same lapse of time as if the occupation was by private person.[11]

In Soule v. Hough,[12] it was held that the occupation of a single room is not adverse possession to the exclusion of the tenant. Possession under contract of sale is adverse possession to all other claims,[13] or under defective deed.[14]

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[10] Bartlett v. Secer, 56 Wis. 520; Dame v. Chandler (Ga.), 4 S. E. Rep. 765; Marble v. Price, 54 Mich. 466; Todd v. Todd (Ill.), 7 N. E. Rep. 738; Roots v. Beck (Ind.), 9 N. E. Rep. 698.

[11] Cooper v. Detroit, 42 Mich. 584; Hayne v. Osborn, 28 N. W. Rep. 821 and note; Railway Co. v. Maffit, 6 S. W. Rep. 600; Scott v. Woodruff, 4 S. W. Rep. 908; Skinner v. Crawford, 54 Iowa, 440.

[12] 45 Mich. 418; Haseltine v. Mosher, 51 Wis. 443; McMillan v. Wehle, 55 Wis. 685; Raymond v. Morrison, 59 Iowa 371; Murphy v. Doyle (Minn.), 33 N. W. Rep. 220.

[13] Montgomery v. Stevenson, 64 Iowa, 326.

[14] Case v. Green, 53 Mich. 615.

GIFT INTER VIVOS — DECLARATIONS OF DONOR—DELIVEY.

BENNETT V. COOK.

Supreme Court of South Carolina, April 3, 1888.

1. *Gift Inter Vivos — Declarations of Donor.*— Where there has been plenary proof of a gift, it is not error, in an action by the administrator of the donor against the donee, to exclude declarations of the donor tending to controvert the gift.

2. *Same—Delivery.*—To constitute a legal parol gift of chattels there must be actual or constructive delivery, so as to confer the right of enjoyment *in præsenti;* but the fact that the chattels were in the donee's possession at the time of the death of the donor, with whom the donee was living, may be considered as showing that there was no occasion to make a visible transfer of possession.

3. *Same—Reservation of Right to Use.*—Where an absolute gift is made, a reservation of the right to use, in the nature of a condition subsequent, will not invalidate the gift.

Action by William Bennett, administrator, against Joe Cook, to obtain possession of certain property claimed by defendant as a gift from the intestate in his life-time. Judgment was rendered in favor of defendant, and plaintiff appeals.

MCGOWAN, J., delivered the opinion of the court:

James Hughey, becoming old and infirm, and finding himself alone, and without any one of his immediate family to take care of him, sold his little tract of land, and went to live with the defendant, who had married his adopted daughter, to whom he was attached. Upon the occasion of his removal he seems to have carried with him a horse, about 60 bushels of corn, a gun, a few pieces of old furniture, and some notes, amounting in value, as alleged, to about $800. He was received and treated kindly by the defendant and his wife. They nursed him in his last illness, employed and

paid for what medical attention he wanted; and in about six months thereafter he died intestate, leaving his property in their possession. Soon after the death of the intestate, the plaintiff, who had married a daughter of the deceased, applied for letters of administration upon the estate, and, before the time had elapsed for obtaining full letters, he received some authority in the nature of letters *ad colligendum bona* to gather up the goods of the deceased, and sued the defendant for the aforesaid property. The defendant answered, claiming title to the property which remained by parol gift from the intestate in his lifetime, the inducing cause or consideration being the love and affection to his wife, the adopted daughter of the deceased, and the services rendered the intestate in his old age and helpless condition by the defendant and his wife. It was referred to a referee to take the testimony, much of which consisted of the "declarations" of the intestate that he "had given," or "intended to give," the property to Cook and wife, and was taken subject to exception. It is all printed in the brief. The cause came on to be heard by Judge Hudson, who ruled that all the testimony of both the plaintiff and defendant touching transactions and communications of the witnesses with the deceased must be stricken out, under section 400 of the Code; and that all the testimony of other witnesses in behalf of the plaintiff as to declarations of the deceased in support of his title, and against the gift, must also be stricken out. The judge in his decree says that, "after eliminating from the case all this incompetent and irrelevant testimony, and after considering the other testimony, I find that the great weight of the evidence is in favor of the title of the defendant and wife, and is against the claim of the plaintiff. * * * I find as a matter of fact that the intestate at the time of his death did not own the property in dispute, having giving the same to the defendant and his wife, and hence the plaintiff cannot recover" — and dismissed the complaint. From this decree the plaintiff appeals upon exceptions: "(1) Because, it is respectfully submitted his honor erred in ruling that all the testimony of witnesses in behalf of the plaintiff as to declarations of deceased in support of his title, and against the gift, must be stricken out, testimony of like nature in support of the gift having been previously introduced by defendant. (2) Because his honor erred in finding that the great weight of the evidence is in favor of the title of the defendant and wife, and is against the claim of the plaintiff. (3) Because his honor erred in finding that this case is similar, in the character of the proof of the gift, to the case of Blake v. Jones, Bailey, Eq. 142, it being respectfully submitted that there is no parallel between the two cases. (4) Because his honor erred in finding that the delivery was made as far as is usual under like circumstances, and that the defendant and wife had possession of the property sufficient amount to a delivery. (5) Because his honor erred in finding that the plaintiff gave the horse to defendant and wife for immediate use as their horse. (6) Because his honor erred in finding that the plaintiff had no right to any of the property traced to the defendant's possession, and named in the complaint. (7) Because his honor erred in finding that defendant had only one dollar and fifty cents in his possession of the money of the intestate, and that he had offered to turn over the same to plaintiff. (8) Because his honor erred in deciding that the intestate did not at the time of his death own the property in dispute; that he had given the same to defendant and wife, and adjudging that the complaint should be dismissed." There are no rights of creditors in the case. The intestate seems to have been punctual in paying his debts, and the only contest is between the heirs at law and the defendant.

The general rule of evidence certainly is that declarations are admissible against the interest of the party, but not in his favor. "There is, perhaps, no principle better settled than that when one has entered into a contract, made a gift, or done any other act by which he is bound, he cannot by any subsequent act or declaration of his own avoid or discharge himself from it. If, then, the gift by the testatrix to the defendant's wife was proved, her subsequent declarations were, upon general principles, inadmissible, for the obvious reason that they were irrelevant. They were therefore properly rejected. Cases do sometimes arise in which proof of the gift is made up of repeated declarations of the donor, running through several years; where such declarations are brought in, by the party claiming under it, in support of doubtful evidence of the gift. In these and such like cases, such declaration are admissible in reply to such evidence. The case of Sims v. Saunders, Harp. 374, is an illustration of this." M'Kane v. Bonner, 1 Bailey, 116. It seems that in respect to alleged parol gifts, proof of declarations of the donor is only allowable in doubtful cases upon the question of gift or no gift, and the evidence on both sides consists of declarations of the alleged donor. The doctrine is clearly exceptional in character, and, as it trenches closely on forbidden ground, it should not be allowed to go beyond the necessity of the case, and then be received with great caution. "Where there has been plenary proof of the gift, subsequent declarations of the donor that a gift was not intended is inadmissible." M'Kane v. Bonner, *supra*. It seems that the circuit judge was entirely satisfied, "from the great weight of the evidence," that "plenary proof of the gift" has been made. And according to the well-established rule of this court that finding of fact will not be disturbed unless it is against the weight of the evidence which we have read and considered, we cannot say there was error of law in excluding the subsequent declarations of the intestate tending to controvert the gift previously made.

But it is strongly urged upon us that there was no sufficient proof of gift perfected by a delivery;

that the whole evidence taken together showed, at the most, an intention to give at the death of the donor, which was testamentary in character and void, as being in conflict with the law as to wills. The question whether there was a delivery was also a question of fact which the circuit judge has decided. It is said, however, that his view of what, under such circumstances, would constitute a legal delivery was error of law. There is no doubt that a parol gift of chattles cannot be made to take effect *in futuro*. To constitute a legal gift there must be an actual or constructive delivery of possession so as to confer the right of enjoyment *in præsenti*. The rule seems very plain, but there are so many kinds of personal property, and circumstances are so various, there is often no little difficulty in applying it properly. It has been settled that it is not necessary that there should be in all cases an actual manual delivery. The principle is stated thus: "Property in a chattel cannot be transferred by a parol gift without delivery; but by delivery is not meant an actual manual delivery in all cases, but any circumstances amounting to a clear demonstration of the intention of the one to transfer, and of the other to accept, and which puts it into his power, or gives him authority to take possession, is all that is necessary, and is a fact that is left to the jury." Reid v. Colcock, 1 Nott & McC. 592: Banks v. Hatton, *Id*. 221; Blake v. Jones, Bailey, Eq. 141. The latter case, as remarked by the circuit judge, "is very similar in the character of the proof" to this. In that case it was held that, "when a donor has repeatedly declared his intention to give, his subsequent admissions that 'he had given,' are sufficient evidence of an actual delivery to complete the title of the donee when it does not appear that the declarations were loose and playful, and particularly when the donor was under a moral obligation to make the gift." Indeed, upon the point of delivery, this case is stronger than that of Blake v. Jones, for there the slaves recovered by a daughter from the administrator of her father were never in the actual possession of the donee. The father had said, "When you get a plantation, I will send them to you, and in the meantime I might as well pay you hire as any one else." While here the property, at the time of the death of the alleged donor, was already in the possession of the person claiming as donee. It may be said that this arose from the accidental circumstances that the intestate at the time of his death was living with the defendant; but it seems to us it is a circumstance entitled to some consideration, at least, in this: that at the time of the alleged gift there was no occasion to make a visible transfer of the possession (the usual evidence of such a gift), for the defendant was already in possession in a general sense.

We see no reason to except the "cream horse" from the other property. It appeared from the testimony of Weekly, Searson, Shaffer, and others, that the intestate, three or four weeks before his death, said: "I have moved to Joe Cook's for some time. I don't intend to live by myself any more. All I've got I have carried to Joe Cook's, and there is where I expect to stay until I die. And this horse I have given to Joe Cook on condition that, when I want to ride, he is my horse, and, when I have no use for the horse, it's Joe Cook's, and all that I have." "Where the gift of a slave was absolute in its terms, and accompanied with delivery of possession, held that the reservation of a right 'to borrow' under certain circumstances, or to receive 'something like hire' if the donor should stand in need, was a condition subsequent, and did not invalidate the gift although made by parol," etc. M'Kane v. Bonner, *supra*.

The judgment of this court is that the judgment of the circuit court be affirmed.

NOTE.—A mere intention, or naked promise to give, without delivery or some act sufficient to pass the property, is not a gift, but may be revoked, and cannot be enforced.[1] To constitute a valid parol gift of chattels it should be made to take effect *in præsenti*.[2] The essential elements are delivery of the chattels and an intention on the part of the donor to surrender to the donee his dominion over them.[3] Delivery is essential both to gifts *inter vivos* and to gifts *causa mortis*.[4] But the delivery and words of donation need not always be simultaneous.[5] Actual delivery is usually necessary,[6] but this matter depends largely on the nature of the thing given,[7] and constructive delivery may sometimes be sufficient.[8]

As the question of the sufficiency of the delivery is the point on which controversies as to the validity of alleged gifts *inter vivos* usually turn, it may be well to review the authorities upon that subject in detail. Merely pointing out an animal and saying to the person who claims it as a gift, "that is your property, I give it to you," without any further delivery, does not amount to a gift.[9] An attempted gift of bonds by placing them in an envelope and making a memorandum thereon, will not constitute a valid gift where the original owner retains them in his own safe and col-

1 5 Kent Com. *438; 2 Sch. Pers. Prop. § 65; Carpenter v. Dodge, 20 Vt. 595; Taylor v. Staples, 8 R. I. 170; Antrobus v. Smith, 12 Ves. 39; Lee v. Missing, 3 W. & M. 519; Kekewich v. Manning, 50 Eng. Ch. 175; Martin v. Funk, 75 N. Y. 134; Northrop v. Hale, 73 Me. 66; Johnston v. Griest, 85 Ind. 503.

2 Shower v. Pilck, 4 Exch. 478; Dole v. Lincoln, 31 Me. 428; Young v. Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634, 639.

3 Jackson v. Twenty-third St. R. Co., 88 N. Y. 520; 2 Kent Com. *439; Noble v. Smith, 2 Johns. 52; Schuck v. Grote (N. J.), 7 Atl. Rep. 852.

4 Young v. Young, 80 N. Y. 422; Durand v. Taylor, 52 Iowa, 503; Curry v. Powers, 70 N. Y. 212; Wilcox v. Matteson, 53 Wis. 23; s. c., 40 Am. Rep. 754; McWillie v. Van Vacter, 35 Miss. 428; s. c., 72 Am. Dec. 127. And see authorities cited in note to Gano v. Fisk, 22 Cent. L. J. 299, 303, and Bradley v. Hunt, 23 Am. Dec. 597, 600.

5 Carradine v. Carradine, 58 Miss. 286; s. c., 38 Am. Rep. 324, 326.

6 "The general rule is to require the utmost delivery of which the thing is actually capable:" 2 Sch. Pers. Prop. § 75. See also Woodruff v. Cook, 25 Barb. 505; Sanborn v. Goodline, 28 N. H. 48; s. c., 59 Am. Dec. 398.

7 2 Kent Com. *439.

8 Pope v. Randolph, 13 Ala. 214; Carradine v. Collins, 8med. & M. (Miss.) 428.

9 Brewer v. Harvey, 72 N. C. 176. See also Medlock v. Powell, 96 N. C. 499; Taylor's Appeal, 75 Pa. St. 115.]

lects the interest for his own use.[10] In a recent case in New Jersey, the defendant, who had been living with her grandfather, after his death produced a tin pail containing several hundred dollars in gold and bills together with a paper signed by her grandfather and purporting to give her the contents of the pail. It appeared that there was a much smaller sum in the pail at the time of the gift than at the time of the grandfather's death, and that he had access to and control of the pail at various times between those two dates. The granddaughter claimed the entire amount as a gift, but the court, in an action for discovery of assets, gave judgment in her favor only for the amount in the pail at the date of the writing and in favor of the executors for the balance.[11]

A symbolic delivery is sometimes sufficient. Thus the delivery of a key to the trunk or warehouse in which the article is stored has been held to pass the title.[12] And the delivery of a bank-book by a depositor with intention to give the deposit is a valid gift thereof.[13]

The mere fact that one deposits money in bank in another's name, but subject to the depositor's order and control and without notice to the person in whose name it is deposited, will not of itself, constitute a gift *inter vivos*.[14] But the gift of a bank-book already in possession of the donee has been held a valid and sufficient gift of the deposit.[15] And a deposit in bank in the name of another, although subject to the right of the depositor to the income during his life, the donee assenting thereto, has been held to constitute a valid gift *inter vivos*, where it appeared that the donor intended it as a valid gift, notwithstanding the fact that he retained the bank-book.[16] But a direction by the depositor to the bank treasurer to pay the account to himself during life and afterwards to another, such direction being made after the deposit and without knowledge of the person to whom the payment was ordered to be made, operates neither as a gift nor as a trust in favor of such person.[17] As a general rule, in such cases, it is necessary, in order to constitute a gift, that the deposit be made in the name of the donee with the intention on the part of the donor of making a gift of it, and that it be accepted by the donee, either expressly or by implication.[18]

Where the donee is already in possession, visible or manual delivery is not generally necessary.[19] And it is not always necessary that the delivery should be made directly to the donee, for it may be made to a trustee for his benefit.[20]

An acceptance on the part of the donee is necessary to perfect the gift but where it is with his knowledge and for his benefit, in the absence of anything to the contrary, an acceptance will generally be presumed.[21]

Although not a contract for a consideration, a perfected gift is equally irrevocable by the donor.[22]

The burden of proof is usually upon the claimant to show a valid gift.[23] Declarations of the donor are generally competent for that purpose.[24] But declarations of the donor, after delivery are not generally admissible to impeach the gift.[25] Declarations of the donee, however, disclaiming ownership are competent.[26]

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[10] Young v. Young, 80 N. Y. 422; s. c., 36 Am. Rep. 634. But compare Gerrish v. New Bedford Inst., 128 Mass. 159; s. c., 35 Am. Rep. 365. And see Trow v. Shannon, 78 N. Y. 446.

[11] Space's Exrs. v. Guest (N. J.), 10 Atl. Rep. 152.

[12] Bedell v. Carll, 33 N. Y. 581; Ward v. Turner, 2 Ves. Sr., 442; Bond v. Bunting, 78 Pa. St. 210; Carleton v. Lovejoy, 54 Me. 445.

[13] Camp's Appeal, 36 Conn, 88; s. c., 4 Am. Rep. 39; Penfield v. Thayer, 2 E. D. Smith (N. Y.), 305; Reed v. Spaulding, 42 N. H. 114, 119; Davis v. Ney, 125 Mass. 590; s. c., 28 Am. Rep. 272; Hill v. Stevenson, 63 Me. 364; s. c., 18 Am. Rep. 231. See also Sheedy v. Beach, 26 Am. Rep. 680, and note, 684.

[14] Marcy v. Amayeen, 61 N. H. 131; s. c., 60 Am. Rep. 320. See also Nutt v. Morse, 142 Mass. 1; Orr v. McGregor, 43 Hun, 528; Burton v. Bridgeport Savings Bank, 52 Conn. 398; s. c., 52 Am. Rep. 602; Sherman v. New Bedford, etc. Bank, 138 Mass. 581.

[15] Providence Inst. for Savings v. Taft, 14 R. I. 502.

[16] Smith v. Ossipee, etc. Bank (N. H.), 9 Atl. Rep. 792.

[17] Pope v. Cushing, 19 Cent. L. J. 471; s. c., 56 Vt. 284.

[18] Scott v. Ford, 140 Mass. 157; s. c., 2 N. E. Rep. 925.

[19] Tenbrook v. Brown, 17 Ind. 410; Allen v. Cowan, 23 N. Y. 502; Wing v. Merchant, 57 Me. 383; Waring v. Edmonds, 11 Md. 424; Sutherland v. Sutherland, 5 Bush (Ky.), 591; Ross v. Draper, 55 Vt. 404; s. c., 45 Am. Rep. 624, and note, 627. Compare Willey v. Backus, 52 Iowa, 401.

[20] Dresser v. Dresser, 46 Me. 48; Gardner v. Merritt, 32 Md. 78.

[21] "Gifts Inter Vivos," 19 Cent. L. J. 422, 424; Scott v. Ford, 140 Mass. 157; s. c., 2 N. E. Rep. 925, 927; DeLivillain v. Evans, 39 Cal. 120.

[22] Monatt v. Parker, 30 La. Ann. 585; s. c., 31 Am. Rep. 229; Bedell v. Carll, 33 N. Y. 581; Stewart v. Hidden, 13 Minn. 43; Kellogg v. Adams, 51 Wis. 138; "Gifts Inter Vivos," 19 Cent. L. J. 422, and authorities there cited.

[23] Walker v. Welsh (Mass.), 11 N. E. Rep. 727, 728; Samson v. Samson (Iowa), 25 N. W. Rep. 233; Parker v. Parker, 5 Atl. Rep. 586.

[24] Abbott's Trial Ev. 155; McCluney v. Lockhart, 1 Bailey (S. C.), 117; Scott v. Ford (Mass.), 2 N. E. Rep. 925.

[25] Abbott's Trial Ev. 155; Sanford v. Sanford, 5 Lans. (N. Y.) 486; McKane v. Bonner, 1 Bailey (S. C.), 116; Hatch v. Straight, 3 Conn. 31. *Contra:* Rollins v. Strout, 4 Nev. 150.

[26] Rich v. Mobley, 33 Ga. 85, 88.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ABATEMENT—Judgment Against Trustee, Revival.——A judgment of foreclosure on a mortgage given by a trustee ordered the trustee to pay any deficiency in the amount, and no execution therefor was issued; the judgment may be revived by issuing summons to the trustee's executor to show cause, and the estate subjected to the payment decreed on foreclosure.—*McDowall v. Reed*, S. C. S. Car., April 11, 1888; 6 S. E. Rep. 300.

2. ADMIRALTY—Costs—Excessive Claim.——A libelant, who has filed a claim for $20,000, and recovered only $500, will not be allowed costs, when it appears that by waiting two days he could have ascertained without risk that his loss would be less than $500.—*The Stelvivio*, U. S. D. C. (N. Y.), Feb. 1, 1888; 34 Fed. Rep, 431.

3. ADMIRALTY—Death by Wrongful Act.——Though a State statute allows the personal representative to sue for damages for the wrongful act of another, causing the death of the injured party, such suits are not permissible in admiralty.—*Oleson v. The Ida Campbell*, U. S. D. C. (Minn.), March 9, 1888; 34 Fed. Rep. 432.

4. ADMIRALTY—Personal Injuries—Contributory Negligence.——Contributory negligence is a bar to a suit in admiralty for personal injuries; and when the fault is concurrent or mutual, the court will apportion the damages according to the equity and justice of the case.—*Olson v. Flavel*, U. S. D. C. (Oreg.), March 31, 1888; 34 Fed. Rep. 477.

5. APPEAL—Abatement—Death.——A petition in error on a judgment, wherein the plaintiff is made the only defendant in error, is a nullity, when the plaintiff had died before the petition was filed.—*Kuhnert v. Conde*, S. C. Kans., May 4, 1888; 18 Pac. Rep. 193.

6. APPEAL—Assignment of Error.——When no exceptions appear in the record, and no errors are assigned, the judgment will be affirmed.—*Gulley v. Penny*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 394.

7. APPEAL—Decision—Concurrence.——The decision in this case, under West Virginia constitution, is not binding authority in any other case, because not concurred in by three judges.—*Bruff v. Thompson*, S. C. App. W. Va., Feb. 18, 1888; 6 S. E. Rep. 352.

8. APPEAL—Decision—Modification Below.——When a judgment, whether final or interlocutory, is affirmed on appeal, the court below upon its return cannot modify it, unless in a direct proceeding for fraud, mistake, etc.—*Dobson v. Simonton*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 369.

9. APPEAL—Filing Bond—Dismissal.——When an appeal bond has no date, except its justification, which date is long after the time allowed for filing the bond, and it is not shown that the bond was filed in time, the appeal will be dismissed.—*Harmon v. Herndon*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 411.

10. APPEAL—From Justice—Review of Evidence.——Upon an appeal from a justice of the peace upon questions of law, the evidence being returned, the appellant may avail himself of the point, that there was no evidence to justify the judgment.—*Palmer v. St. Paul, etc. R. R.*, S. C. Minn., May 14, 1888; 38 N. W. Rep. 100.

11. APPEAL — Mandate — Entry of Decree.—— When one portion of a decree is appealed from and reversed, the entry of a decree below is not erroneous for failure to make any order as to a part of the former decree not appealed from.—*Jones v. Jones*, S. C. Wis., April 17, 1888; 38 N. W. Rep. 88.

12. APPEAL — Referee's Report — Exceptions.——Alleged errors in the findings of a referee cannot be assigned for the first time on appeal.—*Abernathy v. Withers*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 376.

13. APPEAL—Review.——Where the overruling of a motion for a new trial is the only ground upon which an appeal is taken, the appellate court will not consider causes for a new trial which were not before the trial court.—*Kernodle v. Gibson*, S. C. Ind., May 10, 1888; 17 N. E. Rep. 99.

14. APPEAL—Review.——Where a case is tried by the trial court, and there are no declarations of law made and it is taken first to the appellate court, then to the supreme court, that tribunal can only pass upon the law as *dictar* decided by the trial court.—*Einstein v. Haskell*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 59.

15. APPEAL — Review — Harmless Error.—— Where special pleas demurred to simply raise the question of plaintiff's ownership and right to maintain the action, and defendant rightfully has the benefit of his entire defense under the general issue, the special pleas and the rulings thereon are immaterial.—*Middleton v. Wilson*, S. C. Ala., May 17, 1888; 4 South. Rep. 228.

16. APPEAL—Review—Presumptions.——All presumptions are in favor of the regularity of the proceedings of district court, and its judgments will not be reversed, unless error affirmatively appears of record.—*McBride v. Lathrop*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 31.

17. APPEAL—Review — Presumption —Instructions.—— Where the evidence is not in the record it will be presumed on appeal that instructions refused were not warranted by the evidence.—*Silver v. Parr*, S. C. Ind., May 12, 1888; 17 N. E. Rep. 114.

18. APPEAL—Review—Weight of Evidence.——A verdict, sustained by substantial evidence, upon which a judgment has been rendered, will not be disturbed on appeal, though the court considers the weight of evidence to be against the verdict.—*Lee v. Bermingham*, S. C. Kans., May 4, 1888; 18 Pac. Rep. 218.

19. APPEAL—Ruling on Evidence.——The refusal to allow a witness to answer a question will not reviewed, when it does not appear what evidence would have been elicited, or that the witness would have made any response.—*Paddleford v. Cook*, S. C. Iowa, May 14, 1888; 38 N. W. Rep. 137.

20. APPEAL—Statute—Justice.——Under the statute of Indiana, an appeal does not lie from the judgment of a justice rendered upon a plea of guilty, after the defendant has given replevin bail for the judgment.—*Holsclaw v. State*, S. C. Ind., May 11, 1888; 17 N. E. Rep. 112.

21. APPEAL — Sufficiency of Evidence.—— When a question of fact is submitted to the court, which finds generally for the defendant, such finding is conclusive on the plaintiff, unless it is shown there was no competent evidence to sustain the finding.—*McKinney v. Ward*, S. C. Kans., May 4, 1888; 18 Pac. Rep. 196.

22. APPEAL—Weight of evidence.——When there is a conflict of evidence, the verdict of the jury will not be disturbed on appeal.—*Thompson v. Maxwell*, S. C. Iowa, May 12, 1888; 38 N. W. Rep. 125.

23. ARBITRATION AND AWARD — Submission.—— An agreement by the owner of land to submit to arbitration the amount of compensation for land sought to be taken by a railroad for a right of way is binding upon the parties.—*Knoche v. Chicago, etc. R. R.* U. S. C. C. (Mo.), Jan. 13, 1888; 34 Fed. Rep. 471.

24 ASSIGNMENT FOR CREDITORS—Filing Claims—Time.——When the assignee for the benefit of creditors makes his report, under Iowa law, at the end of three

months, showing that a claim was filed after the three months, it is his duty to resist its allowance as if filed within the three months. A creditor is not entitled to equitable relief, though he received the notice but two days before the three months expired, the statute being a bar.—*Conlee L. Co. v. Meyer*, S. C. Iowa, May 11, 1888; 38 N. W. Rep. 117.

25. ASSUMPSIT—Fraudulent Representations—Instructions.——In *assumpsit* for the price of a horse, where the defense is false and fraudulent representations by the plaintiff at the time of the sale, an instruction is correct that no representation can amount to a fraud which is not relied on by the defendant.—*Moses v. Katzenberger*, S. C. Ala , May 21, 1888; 4 South. Rep. 237.

26. ATTACHMENT—Intention—State Practice.—— When an assignee for the benefit of creditors intervenes in a federal court in a case where property in his hands has been attached as property of the assignor, he cannot ask judgment by default, under Missouri law, for failure of the plaintiff to answer his petition, when the attaching officer has filed his answer.—*Boltz v. Eagon*, U. S. C. C. (Mo.), April 9, 1888; 34 Fed. Rep. 452.

27. ATTACHMENT—Property in Hands of Assignee.—— Property in the hands of an assignee for the benefit of creditors may be attached by process from the federal court in a suit by a non-resident against the assignor, and the assignee may intervene in the suit.—*Boltz v. Eagon*, U. S. C. C. (Mo.), March 27, 1888; 34 Fed. Rep. 445.

28. ATTORNEY AND CLIENT—Action for Fees—Evidence. ——A agreed to pay B attorney's fees if he would procure a rehearing in a land case from the secretary of interior: *Held*, that telegrams and a letter from the secretary, stating that such rehearing would be granted on a certain day, are admissible to prove that the rehearing was granted.— *Stewart v. Robinson*, S. C. Cal., May 16, 1888; 18 Pac. Rep. 157.

29. ATTORNEY AND CLIENT— Contingent Fee—Rescission.——A gave B a power of attorney, with right of substitution, to collect a claim against the government, agreeing to pay him half of the amount collected. B substituted plaintiff as attorney by indorsement on his contract with A, under an agreement that plaintiff should advance certain moneys and receive half the fee. A afterwards revoked B's power of attorney, and assigned half the money, after it had been awarded, to B and D, who assigned it to defendant: *Held*, that defendant took half the money, free of all claim by plaintiff, the latter having no written assignment of the claim or written instrument giving him a lien on it.—*Porter v. White*, U. S. S. C., April 30, 1888; 8 S. C. Rep. 1217.

30. AWARDS — Foreign Governments — Conflicting Claims.——An answer of the secretary of State that the award of a foreign government is claimed by different parties, and that he cannot pay it without involving the government in suits, in which it is not interested, and that he is willing to pay it over on a joint receipt by all the claimants, is not demurrable.—*Bayard v. U. S.*, U. S. S. C., April 23, 1888; 8 S. C. Rep. 1223.

31. BAIL—Forfeiture—Action on Bond.——The surrender of the principal in a forfeited recognizance after the entry of judgment *nisi* thereon, will not release the sureties from the penalty of the recognizance, but in such case, under Texas law, the court may remit part of the penalty and enter judgment for a part thereof. Sureties cannot defend in an action on the bond on the ground that the indictment against the principal was bad.—*Lee v. State*, Tex. Ct. App., April 11, 1888; 8 S. W. Rep. 277.

32. BANKRUPTCY—War Claims.——Claims under the Geneva commission against the treasury of the United States do not pass to the assignee in bankruptcy of the party who paid war premiums where the assignment was made before the passage of the act of congress.—*Heard v. Sturgis*, S J. C. Mass., April 25, 1888; 16 N. E. Rep. 437.

33. BANKS—Funds Drawn by Cestui Que Trust—Rights of Bank.——Where an executor authorized the beneficiary under the will to draw on the funds of the estate deposited by him in bank, and the latter continued to draw on them after the death of the executor, the receiver of the bank cannot recover from such beneficiary for the benefit of the bank's creditors the money so drawn by him after the executor's death.—*Bank of Statesville v. Waddell*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 414.

34. BASTARDY—Bond—Recording.——A recognizance taken by a justice of the peace in a bastardy proceeding is valid against a surety thereon, though it was not entered of record on the appearance docket of the district court, as required by law.—*State v. Moran*, S. C. Neb., April 28, 1888; 38 N. W. Rep. 29.

35. BILLS AND NOTES—When Negotiable.——A contract to pay money with exchange on New York, or which authorizes the payee to declare it due whenever deemed insecure, is not a negotiable note.—*Carroll Co. S. Bank v. Srother*, S. C. S. Car., April 19, 1888; 6 S. E. Rep. 313.

36. BOUNDARIES—Calls—Entry—Grant.—— The calls and descriptions in an entry of vacant land must yield to those in the grant issued on such entry. The descriptive calls in a survey must yield to established corners, as well as locative calls.—*Bowers v. Dickinson*, S. C. App. W. Va., Feb. 4, 1888; 6 S. E. Rep. 335.

37. BROKER — Sale of Realty — Commissions. —— A broker employed to sell lands, who brings and introduces a buyer to the owner and starts the negotiations, which result in a sale, is entitled to his commissions, though he was not present until the completion of the sale.—*Dreisback v. Rollins*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 187.

38. CARRIERS—Breach of Contract—Damages. —— In an action against a carrier for failure to deliver fruit trees at the point of destination, the price at which the plaintiff contracted to sell them at that point affords some evidence of their value there.—*Clements v. Burlington, etc. R. Co.*, S. C. Iowa, May 15, 1888; 38 N. W. Rep. 144.

39. CARRIER—Connecting Lines.——Where a carrier requires payment of freight in advance for all connecting lines, he is bound to see that those connecting lines are under the same obligations to the consignor as if they had received the goods from him with payment in advance of freight.—*Palmer v. Chicago, etc. Co.*, S. C. Err. Conn., January Term, 1888; 13 Atl. Rep. 818.

40. CARIERS — Discrimination — Railroad Company—Statute.——Under the statute law of Massachusetts, it is competent for a railroad company to make a contract with a party, giving him and his agents the exclusive right of coming upon the premises of the company to solicit patronage from passengers arriving there.—*Old Colony, etc. Co. v. Tripp*, S. J. C. Mass., June 1, 1888; 17 N. E. Rep. 89.

41. CARRIERS—Passengers—Negligence.——The failure of the proprietor of a coach to furnish suitable lights and good reliable horses, make out sufficient evidence of negligence to constitute a *prima facie* case against the carrier for personal injuries sustained by the upsetting of a coach in the night.— *Anderson v. Scholey*, S. C. Ind., May 17, 1888; 17 N. E. Rep. 125.

42. CHATTEL MORTGAGE—Place of Record.——Under North Carolina law, a chattel mortgage of goods in a branch store, recorded in a different county, wherein the mortgagor resides, carries the title thereto as against a mortgage previously recorded in the county where the goods are, though possession was delivered to the latter mortgagee.—*Weaver v. Chunn*, S. C. N. Car., April 30, 1888;6 S. E. Rep. 370.

43. CHATTEL MORTGAGE— Sales by Mortgagor.——A gave a deed of trust on certain planing mill stock to B to secure a debt, under a parol agreement that A might continue to sell the stock for his own benefit in the usual course of trade. Afterwards A assigned, and with consent of the assignee B took possession of this stock under the trust deed: *Held*, that the trust is valid against creditors of A, who attach the property thereafter.—*Dobyns v. Meyer*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 251.

44. COLLISION—Damages—Cost of Repairs.—— When a vessel, damaged by collision, has an estimate made of the cost of repairs at the place of the injury, but is afterwards repaired at another place at a less cost, the latter amount is the measure of her recovery.—*The City of Chester*, U. S. D. C. (N. Y.), March 14, 1888; 34 Fed. Rep. 429.

45. COLLISION—Lights.——Failure to display a light or torch, required by the statutes, is negligence, if there is a possibility that by such display the collision might have been avoided.—*The Frank P. Lee*, U. S. C. C. (Penn.), March 10, 1888; 34 Fed. Rep. 480.

46. COLLISION—Lookout—Ferry Boat.——A steamer navigating a harbor at night must have a lookout properly stationed. A ferry boat has no special privileges or exemptions not possessed by other steamers.—*The Manhasset*, U. S. D. C. (Va.), March 5, 1888; 34 Fed. Rep. 408.

47. COLLISION—Steamers—Lights.——A was going up stream and B was coming down, and B's officers saw A's lights, but supposed them to belong to another vessel going down, and a collision occurred therefrom: *Held*, that B's officers were guilty of carelessness or recklessness.—*The Helena*, U. S. C. C. (Penn.), March 10, 1888; 34 Fed. Rep. 425.

48. CONDITIONAL SALE— Lien — Insolvency. —— The lien of a vendor by conditional sale is good, under the statutes of New Hampshire, against the assignee in insolvency of the vendee, although the written memorandum of the lien shows no affidavit.—*Adams v. See's Assignee*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 786.

49. CONSTITUTIONAL LAW—Bill of Rights.——Whether under the bill of rights of this State a jury trial is secured in cases of crimes and misdemeanors, and whether a trial by the court without a jury is inhibited, and whether the court may, without a jury, try a misdemeanor case even with the consent of the accused, are points upon which the court is evenly divided.—*State v. Cottrill*, S. C. App. W. Va., Feb. 28, 1888; 6 S. E. Rep. 428.

50. CONSTITUTIONAL LAW — Courts—Mandamus.—— Under the constitution of Illinois, the appellate court cannot issue a writ of *mandamus* requiring a judge of a superior court to sign a bill of exceptions in a cause not appealed to the appellate court nor pending therein.—*Hawes v. People*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 13.

51. CONSTITUTIONAL LAW—Eminent Domain.——Under the constitution of Pennsylvania, corporations cannot take private property for public uses by right of eminent domain without making due compensation to the owners thereof.—*Pennsylvania, etc. Co. v Magee*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 839.

52. CONSTITUTIONAL LAW— Private Law.——An act providing for the judicial determination and adjustment of two alleged claims of A, is not in violation of the constitutional amendment of 1881.—*Dike v. State*, S. C. Minn., April 30, 1888; 38 N. W. Rep. 95.

53. CONSTITUTIONAL LAW — Taxation—Corporations—Statutes.——The legislature of Illinois can, under the constitution of that State, classify corporations for taxation purposes, and discriminate between such classes. *Coal, etc. Coal Co. v. Finlen*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 11.

54. CONTRACT—Illegality — Accounting.——One who receives fertilizers under an agreement to sell them, cannot refuse to account for his sales, upon the allegation that such sales are forbidden in the State.—*Tate v. Pegues*, S. C. S. Car., April 11, 1888; 6 S. E. Rep. 298.

55. CONTRACTS—Restraint of Trade.——A covenant in a contract for the sale of a patent right not to manufacture, sell or cause to be sold, any sand-papering machines of any description, not being incidental to the sale of the patent, nor a just and lawful protection to manufacturing or selling thereunder, is void as against public policy, though it affects only a single class of machines.—*Berlin M. W. v. Perry*, S. C. Wis., April 17, 1888; 38 N. W. Rep. 82.

56. CORPORATIONS—Collateral Attack—Alterations.—— The existence of a special corporation created under act Missouri, February 20, 1865, cannot be collaterally attacked merely for failure to file the required certificate with the clerk of the circuit court. A company organized under act Missouri, February 20, 1865, is not subject to alteration by legislative action.—*Granby, etc. Co. v. Richards*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 246.

57. CORPORATIONS—Foreign—Proof of Existence.—— In a suit by a foreign corporation, it must show not only the papers and proceedings of incorporation, but the statute of the State where it was incorporated authorizing such incorporation.—*Savage v. Russell*, S. C. Ala., May 21, 1888; 4 South. Rep. 235.

58. CORPORATION — Incorporation—Amendment.—— Articles of incorporation of a company, organized for mutual profit, under Iowa laws, can be amended only by an instrument signed and acknowledged by those duly authorized and recorded.—*Day v. Mill Owners, etc. Co.*, S. C. Iowa, May 11, 1888; 38 N. W. Rep. 113.

59. CORPORATIONS—Meetings of Directors—Notice.—— The by-laws of a corporation provided for regular meetings of its directors, and at such a meeting the board adjourned until the next day without fixing an hour, and no notice was given to the absent directors: *Held*, that the levying of an assessment at the adjourned meeting was void.—*Thompson v. Williams*, S. C. Cal., May 15, 1888; 18 Pac. Rep. 153.

60. CORPORATION — Quo Warranto —Parties.——In a proceeding by *quo warranto* against a corporation to forfeit its franchises, the corporation is the only necessary party defendant.—*State v. Atchison, etc. R. Co.*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 43.

61. CORPORATION—Stockholders.——A stockholder of a corporation who complains of the misconduct of the treasurer, must apply to the directors to bring suit before he himself sues the treasurer.—*Dunphy v. Travelers', etc. Co.*, S. J. C. Mass., April 6, 1888; 16 N. E. Rep. 426.

62. CORPORATIONS—Stockholders—Husband and Wife. ——When stock is entered on a company's books by direction of a director in the name of his wife, he afterwards voting it, and it does not appear that she authorized or ratified his act, or received any dividends thereon or claimed any interest therein, it is error to charge her separate estate therefor to pay debts of the company.—*Longdale I. Co. v. Pomeroy I. Co.*, U. S. C. C. (Ohio), March 30, 1888; 34 Fed. Rep. 448.

63. COSTS—Eminent Domain—Appeal.——On appeal from an award of damages for property taken for right of way for a railroad, when the verdict is less than the amount of the award, the costs of the appeal should ordinarily be divided between the parties.—*Burlington, etc. R. Co. v. Spere*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 35.

64. COSTS—Eminent Domain—Appeal.——In case of an appeal from the award of damages by the commissioners for a right of way, the appellant will be liable for all costs occasioned by the appeal, if he fails to obtain a more favorable judgment.—*Atchison, etc. R. Co. v. Plantt*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 33.

65. COUNTIES—Creation—Election.——It is the duty of the county board to order an election in the county on the question of the erection of a new county, when it receives a petition describing the territory to be taken, and the name of the new county, signed by a majority of the residents therein.—*State v. Board of Coms.*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 40.

66. COUNTIES — Disbursements —Treasurers.——Under Texas laws, the commissioners' court cannot authorize the county judge to receive and disburse funds, though raised by the county for a special purpose. When funds, which should properly go through the county treasurer's hands, he is entitled to his commissions thereon, though they are disbursed by another officer.—*Bastrop County v. Harn*, S. C. Tex., May 1, 1888; 8 S. W. Rep. 302.

67. COUNTIES—Elections—Assumption of Office.——Officers elected in a new organized county at its first election may qualify and take their offices so soon as the election returns have been canvassed, and within twenty days after receiving official notice of their election.—*Rule v. Tait*, S. C. Kan., April 7, 1888; 18 Pac. Rep. 160.

68. COUNTIES—Official Act—Damages.——A county is not liable to a citizen for the flooding of his premises, caused by obstructing the course of a stream by the county officers in the proper discharge of their duties. —*Downing v. Mason County*, Ky. Ct. App., May 5, 1888; 8 S. W. Rep. 264.

69. COUNTIES—Organization.——Under Kansas law, after the county officers appointed by the governor qualify and enter upon the discharge of their duties, an unorganized county becomes duly organized.—*Keating v. Marble*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 189.

70. COUNTIES—Organization—Laws.——The laws of 1885 and 1887, relative to organizing new counties, are but additional or cumulative acts, and do not repeal chapter 26, laws 1885.—*State v. Board of Comrs.*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 179.

71. COURTS—Jurisdictional Amount—Separate Estate. ——Generally the superior court has not jurisdiction of a suit for a debt of $91 and a lien in connection therewith. It has jurisdiction however, when the debt is alleged to be chargeable upon the separate estate of a married woman and a demand is made for the sale of such estate if need be.—*Charlotte P. M. v. McNinch*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 386.

72. CRIMINAL LAW — Abduction—Statute.——Circumstances stated under which a defendant was guilty of abduction under the Illinois statute. — *Henderson v. People*, S. C. Ill., May 10, 1888; 17 N. E. Rep. 68.

73. CRIMINAL LAW — Absence of Judge From Court Room.——A new trial will not be granted because the judge was absent from the court room for a few moments during the progress of the trial, when no objection was made and it does not appear that the accused was injured thereby.—*O'Shields v. State*, S. C. Ga., May 11, 1888; 6 S. E. Rep. 426.

74. CRIMINAL LAW—Arrest in Another State—Jurisdiction.——A court cannot render judgment in a criminal case when its only jurisdiction is service of process in this State, procured by the illegal arrest of the defendant in another State.—*State v. Simmons*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 177.

75. CRIMINAL LAW—Assault and Battery—Intent.—— Intent to injure is an absolutely essential element of assault and battery, as defined in Pen. Code Tex., art. 484.—*McConnell v. State*, Tex. Ct. App., April 7, 1888; 8 S. W. Rep. 275.

76. CRIMINAL LAW—Carrying Weapons.——In Texas, a party cannot be convicted of unlawfully carrying a pistol, when it was found on him at his place of business and he received anonymous letters threatening an attack on him, and the arrest of the party threatening the attack was at the time impossible.—*Short v. State*, Tex. Ct. App., May 2, 1888; 8 S. W. Rep. 281.

77. CRIMINAL LAW—Chattel Mortgages—Sale of Property.——*Held*, under Code N. C., § 1089, providing punishment for purchasing mortgaged chattels to hinder, etc., the rights of mortgagees, that in this case there was a sufficient description of the crops mortgaged.—*State v. Logan*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 396.

78. CRIMINAL LAW—Confession—Corroboration.——A confession by the defendant of fornication is sufficiently corroborated by proof, that he was found on the bed with the girl in the night and had been there twenty minutes before he was disturbed.—*Burger v. State*, S. C. Ga., May 4, 1888; 6 S. E. Rep. 282.

79. CRIMINAL LAW—Homicide—Resisting Arrest.—— One who resists arrest by a constable with a posse having a warrant of arrest, having reason to believe the arrest to be a mere pretext to disarm him and do him great bodily harm, is not liable if he accidentally kills one of the posse who is there in good faith, while endeavoring to protect himself and to kill the constable or other unlawful assailants, believing at the time that the deceased, with such others are, were also lawfully disposed, would not protect him.—*Minniard v. Com.*, Ky. Ct. App., May 8, 1888; 8 S. W. Rep. 269.

80. CRIMINAL LAW—Homicide—Self-defense.——It is error to charge in a trial for assault with intent to kill, that if defendant believed, and had good reason to believe, that the complaining witness was about to do him some great bodily harm, that would not justify him in using greater force than was necessary to repel such assault, since an assaulted person cannot stop to make such estimate.—*State v. Hickam*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 252.

81. CRIMINAL LAW—Indictment — Idem Sonans.—— Hix Nowels and Hicks Nowells being *idem sonans*, the court rightfully withheld from the jury in a trial for theft, the question of whether the name proved is the name in the indictment.—*Spoonemore v. State*, Tex. Ct. App., April 25, 1888; 8 S. W. Rep. 280.

82. CRIMINAL LAW—Indictment—Names of Witnesses. ——The law requiring the foreman of the grand jury to indorse on the indictment the names of the witnesses examined is directory merely.—*State v. Hollingsworth*, S. C. N. Car., May 19, 1888; 6 S. E. Rep. 417.

83. CRIMINAL LAW—Jail Bounds — Turning out Convicts.——One convicted of a felony has not, under the law, the right of the prison bounds. A court at a term subsequent to the conviction cannot, under the law, authorize the farming out of a convict.—*State v. Pearson*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 387.

84. CRIMINAL LAW—Keeping a Gaming Table—Evidence.——A conviction under an indictment for keeping and exhibiting a gaming table cannot be sustained, when the evidence merely shows that defendant was frequently seen in the house where the offense was being committed.—*Erwin v. State*, Tex. Ct. App., April 11, 1888; 8 S. W. Rep. 276.

85. CRIMINAL LAW—Larceny—Dwelling House.——A charge of larceny of goods from the dwelling house of A is sustained by proof that the house was hotel, kept by A, who resided therein, under Rev. St. Mo. § 1319.—*State v. Leedy*, S. C. Mo., May 7, 1888; 8 S. W. Rep. 245.

86. CRIMINAL LAW—Mayhem—Intent.——Under Rev. St. U. S. § 5348, in a case of mayhem, a premeditated design on the part of the defendant to maim and disfigure need not be shown, but may be inferred.—*U. S. v. Gunther*, S. C. Dak., May 12, 1888; 38 N. W. Rep. 79.

87. CRIMINAL LAW—Misconduct of Jury.——Where, on a trial for forging a receipt, the receipt with a magnifying glass were left in an unlocked drawer in the jury room, but does not appear that the jury saw them, and one juror gave the others whisky from a flask, but no sensible effect was produced on them, the verdict is not vitiated.—*State v. Bailey*, S. C. N. Car. April 30, 1888; 6 S. E. Rep. 372.

88. CRIMINAL LAW—Motion to Quash—Complaint.—— On a motion to qaash an information charging a felony, the court will not inquire into the validity of the original complaint before the magistrate, the crime alleged being the same.—*Alderman v. State*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 36.

89. CRIMINAL LAW—Murder — Evidence.——Evidence that defendant had stolen money from the deceased is admissible as showing a motive for the murder, the deceased having virtually accused the defendant thereof. —*Roberts v. Com.*, Ky. Ct. App., May 8, 1888; 8 S. W. Rep. 270.

90. CRIMINAL LAW—Murder—Mitigating Circumstances. —— When the killing is proved, or admitted to have been done with a deadly weapon, the prisoner must show to the satisfaction of the jury the mitigating circumstances. If the jury is left in doubt as to the mitigating circumstances it is murder.—*State v. Byers*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 420.

91. CRIMINAL LAW — Murder—Self-defense. —— In a trial for murder, where it appears that a friend of deceased was present at the time of the killing, also armed

and assisting him, it is error in the charge to restrict defendant's right to self-defense against deceased alone.—*Bean v. State*, Tex. Ct. App., April 18, 1888; 8 S. W. Rep. 278.

92. CRIMINAL LAW—Pleading and Proof—Variance.——On a trial for perjury, where the false oath is alleged to have been taken in a criminal case against several, including the defendant, designated as John Green, a warrant in that case, in which the name of John Green does not appear, but that of G. Green does appear, is not admissible to connect defendant with such proceeding.—*State v. Green*, S. C. N. Car. May 7, 1888; 6 S. E. Rep. 402.

93. CRIMINAL LAW—Swearing in Public Street.——A prosecution for swearing in a public street, under Pen. Code Tex. § 314, is not barred, because the same act may have also violated the statute by disturbing the inhabitants of private residences.—*Keller v. State*, Tex. Ct. App., April 7, 1888; 9 S. W. Rep. 275.

94 CRIMINAL LAW—Trespass—Complaint.——A complaint for unlawfully cutting grass is sufficient, if it follows the words of the statute. The value of the grass need not be stated.—*State v. Blakesley*, S. C. Kan., April 7, 1888; 18 Pac. Rep. 170.

95. CRIMINAL LAW—Trial by Jury—Waiver.——Under Iowa law, a defendant, who was tried before a justice, for an offense against the liquor law, has a right, on an appeal from the justice's judgment, to waive a trial by jury in the district court.—*State v. Illinois*, S. C. Iowa, May 14, 1888; 38 N. W. Rep. 143.

96. CRIMINAL PRACTICE—Habeas Corpus—Error.——A prisoner sentenced by a court which has jurisdiction cannot be released upon *habeas corpus*, the proper remedy is by writ of error.—*Sennotte v. Swan*, S. J. C. Mass., April 6, 1888; 16 N. E. Rep. 448.

97. CURTESY—Execution Sale——Under North Carolina law, the curtesy of a husband in his wife's land after her death may be sold on execution against him.—*McCaskill v. McCormac*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 423.

98. CUSTOMS DUTIES—Knit Stockings.——Knit stockings, composed in part of wool, must pay a duty of fifty cents per pound and thirty-five per cent. ad valorem.—*Miller v. Vieter*. U. S. S. C., May 16, 1888; 8 S. C. Rep. 1225.

99. DAMAGES — Exemplary.——Exemplary damages cannot be recovered in a civil action, although the tort causing the injury sued for is wilful and is not punishable criminally.—*Greeley, etc. R. R. v. Yeager*, S. C. Colo., May 4, 1888; 18 Pac. Rep. 211.

100. DEDICATION—Custody of Plat.——When real estate is platted into city or village lots, the plat, after being filed with county clerk, should remain in his custody.—*Lincoln L. Co. v. Ackerman*, S. C. Neb., April 24, 1888; 38 N. W. Rep. 25.

101. DEDICATION—Evidence.——Circumstances stated under which it was held that the evidence failed to establish a dedication to public uses of the land in controversy.—*City of Chicago v. Stinson*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 43.

102. DEDICATION — What Constitutes—Evidence.——Circumstances stated under which it was held that the evidence failed to show a dedication to public uses of the land in controversy.—*City of Chicago v. Hill*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 46.

103. DEED—Acknowledgment—Collateral Attack.——In an action of ejectment by a purchaser at a public sale under a deed of trust, which was duly certified by a notary as signed and acknowledged before him by the defendant, and as duly recorded, the defendant cannot prove that he never executed or acknowledged the deed and that he so informed plaintiff on the day of sale.—*Murrell v. Diggs*, S. C. App. Va., May 10, 1888; 6 S. E. Rep. 461.

104. DEEDS—Bona Fide Purchaser.——One who takes a mere conveyance of another's interest in real property or a quit claim thereto, is not protected in equity as a purchaser for value, nor is one who purchases, or takes an assignment of a mortgage, for an antendent debt.—*Gest v. Packwood*, U. S. C. C. (Oreg.), March 19, 1888; 37 Fed. Rep. 368.

105. DEED—Married Woman—Separate Estate—Curtesy.——A deed conveying land to the separate use of a married woman which contained these words: "witnesseth, that the said J M doth grant, bargain and sell," etc., "unto the said Catharine Rank and to her heirs and assigns, exclusively of her husband," does not deprive the husband of his curtesy.—*Rank v. Rank*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 827.

106. DEED—Parol Agreement.——A deed which in ordinary form conveys land by metes and bounds cannot be varied by evidence of a parol agreement that the road by which it is bounded may be graded ten feet below the land.—*Kelley v. Saltmarsle*, S. J. C. Mass., May 3, 1888; 16 N. E. Rep. 460.

107. DEED—Trusts—Executed Use.——Where land is conveyed by a deed to several grantees to hold in fee-simple, but subject to a trust in favor of one E, for his support during life: *Held*, that the trust so declared in favor of E was an executed use to the benefit of which he was entitled, and that the rights of the grantees vested absolutely only at his death.—*O'Melia, et al. v. Mullarky*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 36.

108. DEMURRAGE—VALUE—Evidence.——Evidence of the expenses of the voyage and the time it has taken, including loading and unloading, is competent evidence to show the net value of the vessel per day.—*The Jas. H. Dumont*, U. S. D. C. (N. Y.), March 7, 1888; 34 Fed. Rep. 428.

109. DEPOSITION—Abuse of Process—Habeas Corpus.——A party will be released on habeas corpus for refusing to give his deposition, which is proposed to be taken merely to ascertain what he will testify to at the trial.—*In re Cubberly*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 173.

110. DESCENT AND DISTRIBUTION.——Where the heirs at law of an intestate are brothers and sisters and their decendants, they take *per stirpes*. A grandniece represents her grandfather and takes his share.—*Preston v. Cole*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 788.

111. DISTRICT OF COLUMBIA — Contracts — Additional Compensation.——A contractor cannot, under the United States laws, claim additional compensation beyond his contract with the District of Columbia, though the journal of the board of public works contain an entry that the chief engineer had been notified to allow him larger pay.—*Barnard v. District of Columbia*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1202.

112. DIVORCE — Alimony — Enforcing Decree.——In Alabama, alimony may be decreed on a bill not seeking a divorce, but praying alimony alone. In enforcing such decree the court may attach the husband's person, and failing in this may then place his property in the hands of a receiver, and out of the income thereof raise the alimony, but it cannot sell his property or compel him to earn an income.—*Murray v. Murray*, S. C. Ala., May 23, 1888; 4 South. Rep. 239.

113. DIVORCE—Alimony—Statute—Interest.——Under the statutes of Indiana, alimony must be decreed in a gross sum, but it is competent for the court to allow its payment in installments, and in such case the installments bear no interest unless it is provided in the decree that they shall bear interest.—*Winemiller v. Winemiller*, S. C. Ind., May 16, 1888; 17 N. E. Rep. 123.

114. EJECTMENT — Denying Landlord's Title — Cotenant.——When a tenant of land is sued by his landlord for recovery of possession of the land, judgment for plaintiff is not prevented because his cotenant and codefendant had title to one-half of the land.—*Springs v. Schenck*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 405.

115. DOWER—Charge of Land.——Where the assignees of a widow's land assign it by mortgage subject to her rights of dower, she is entitled, upon foreclosure of the mortgage, to have out of the proceeds of the sale her dower interest which had accrued up to the day of the sale.—*Appeal of Close*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 824.

116. EASEMENT—Water-course—Prescription.—— The right to maintain a dam acquired by prescription is absolute, and will not be lost by any acknowledgment of the owner.—*Wied v. Keenan*, S. C. Vt., May 10, 1888; 13 Atl. Rep. 804.

117. EJECTMENT—Possession—Color of Title.——One in possession of land with no right or title otherwise, cannot question the right of one who has a perfect chain of title, except that one of the grantors in the line of conveyance was a minor.—*Rickershauser v. McMahan*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 217.

118. ELECTIONS—Canvass—Changing Returns.——The trustees of a village, as a board of canvassers, have no right to change the return of the election board, and *mandamus* will lie to compel them to canvass the returns as received.—*State v. Wilson*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 31.

119. EMINENT DOMAIN — Improvements.——Where, under an honest mistake of title, a railroad company makes improvements on lands purchased by it, and afterwards a superior title is found to be outstanding, the holder of that title cannot recover as damages, when the land is condemned by eminent domain, the value of the improvements so put upon the property.—*Ellis v. Rock Island, etc. Co.*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 62.

120. EMINENT DOMAIN—Payment — Widening Streets. ——Where, by charter, the town authorities may widen streets upon reasonable compensation to the owner to be paid from money raised by taxation, with a power of appeal to the courts as to the amount allowed, the commissioners can take the necessary land before the compensation has been ascertained or paid. —*State v. Lyle*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 379.

121. EMINENT DOMAIN—Right of—Examination.——In a proceeding to condemn land for the use of a railroad, the question of the character of the road may be raised, under the Colorado constitution.—*Denver, etc. Co. v. Union P. R. Co.*, U. S. C. C. (Colo.), March 26, 1888; 34 Fed. Rep. 386.

122. EQUITY—Compelling the Delivery of Papers.—— Where plaintiff had intrusted papers to the defendant which have passed into the hands of a third person, equity will not compel the defendant to produce the papers, unless it appears that he still has the control of them, or has wilfully put it out of their power to control them.—*Pattison v. Skillman*, N. J. Ct. Chan., October Term, 1887; 13 Atl. Rep. 808.

123. EQUITY — Contract to Convey — Forfeiture.—— When, in a conveyance of land by a father and mother to a son in consideration of a yearly sum to be paid them during their lives, with a condition of forfeiture in case he fails to pay in the manner and time specified, equity will not enforce a forfeiture on slight grounds, when it would be grossly inequitable so to do.—*Shade v. Oldroyd*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 198.

124. EQUITY—Deed of Trust—Full Relief.——When a court of chancery has rightly assumed jurisdiction to settle accounts growing out of a sale under a deed of trust, it may proceed to grant full relief between the parties.—*Beecher v. Lewis*, S. C. App. Va., March, 1888; 6 S. E. Rep. 367.

125. EQUITY — Fraud — Laches.——In this case, an alleged fraudulent change of contract, made by taking advantage of the ignorance of plaintiff, cannot now be remedied owing to plaintiff's laches.—*Steines v. Manhattan, etc. Co.*, U. S. C. C. (Mo.), March 26, 1888; 34 Fed. Rep. 441.

126. EQUITY—Jurisdiction—Law.——A bill in equity alleged that plaintiff's assignor agreed to give defendants, upon the death of their father, some of whom were minors, credit at his store, that by mistake the charges were entered against the father's estate, that though defendants have interposed by plea the bar of the statute of limitations, yet they have so often promised to pay, that he has been hindered in getting payment: *Held*, that the bill showed no equity.—*Nelson v. Hamner*, S. C. App. Va., May 10, 1888; 6 S. E. Rep. 462.

127. EQUITY—Partition—Money Decree.——A bill in equity by the coassignees of a solid money decree to obtain separate decrees for amounts proportionate to their respective shares will not lie.—*Moorer v. Moorer*, S. C. Ala., May 21, 1888; 4 South. Rep. 234.

128. EQUITY—Recovery of Real Estate—Partition.—— In an action for the recovery of real estate and partition thereof, the first cause of action must, under South Carolina law, be tried by a jury, and upon its determination in favor of plaintiff, the court, on its equity side, may decree partition.—*Reams v. Spann*, S. C. S. Car., April 23, 1888; 6 S. E. Rep. 325.

129. ESCHEAT — Injunction. —— A, claiming to be residuary legatee and heir, sued for partition and account against the executor of, and life tenant of a portion of the estate. The escheator afterwards sued the estate: *Held*, that A would not be allowed to make the escheator a party to his suit so as to enjoin him from prosecuting the escheat.—*Muir v. Thomson*, S. C. S. Car., April 19, 1888; 6 S. E. Rep. 309.

130. ESTATES — Merger — Limitation of Actions.—— Where A has a life estate after B's life estate and purchases B's life estate, the latter merges in the former, and the limitation law runs against the remainderman in favor of a purchaser from A on A's death, though B is still living.—*Boykin v. Ancrum*, S. C. S. Car., April 17, 1888; 6 S. E. Rep. 305.

131. ESTOPPEL — Election.——Where an action was brought by a corporation against seven or eight parties, and the report of the referee was to the effect that the plaintiff was entitled to one of three judgments, and that it might elect between the first two reported, or that judgment would be entered according to the third, the plaintiff having elected to have the second reported judgment entered, and then took out a writ of error: *Held*, that it was estopped by its election and was bound by the judgment so entered.—*Scranton, etc. Co. v. Rauck*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 840.

132. EXECUTION — Attachment — Priority.——Where one creditor obtains a judgment and causes an execution under it, to be levied on personalty, he obtains a priority over a subsequent attaching creditor, although he had previously caused an execution on that judgment to be levied on land, he having released that levy and dismissed the bill supporting it.—*Everingham v. National City Bank*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 26.

133. EXECUTION—Decedent—Limitation—Statute.—— Construction of Illinois statutes relative to the issuance of executions against the estates of decedents. Execution must be issued within seven years, unless the judgment has been reviewed.—*Wilson v. Schneider*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 8.

134. EXECUTION — Levying on Judgment.——Under California law, a judgment cannot be levied on as such and sold under execution.—*Latham v. Blake*, S. C. Cal., May 14, 1888; 18 Pac. Rep. 150.

135. EXECUTION — Supplementary Proceedings.—— Upon return of an execution unsatisfied and the issue of an order for the examination of the debtor and forbidding any transfer of his property, the creditor can have a receiver appointed for the debtor's equitable assets disclosed, under Minnesota laws.—*Tomlinson, etc. Co. v. Shatto*, U. S. C. C. (Minn.), April 2, 1888; 34 Fed. Rep. 380.

136. EXECUTORS—Accounting — Delay.——Under the present law of Texas, a settlement of an estate may be compelled after any lapse of time, in the absence of an order of record showing such settlement.—*Branch v. Hanrick*, S. C. Tex., May 15, 1888; 8 S. W. Rep. 539.

137. EXECUTORS—Realty—Parties to Proceedings.—— A sold land to B, having given a prior mortgage to C. B died. It did not appear that A was unable to pay the mortgage. A and C filed a bill against B's administratrix, to which B's heirs were not parties, to authorize

her to take up the mortgage and give a new mortgage therefor. It was so decreed and B gave the new mortgage, which was assigned to A: *Held*, that the court had no jurisdiction to grant the decree, and the mortgage in A's hands was void as to B's heirs.—*Jones v. Lamar*, U. S. C. C. (Ga.), April 20, 1888; 34 Fed. Rep. 454.

138. EXECUTORS—Reviving Barred Claim—Decree.——When a decree barring a claim against an estate has not been reversed or set aside, the debtor's administrator cannot revive it nor make his sureties liable therefor.—*Crabtree v. Graham*, S. C. Ga., May 11, 1888; 6 S. E. Rep. 426.

138. EXECUTOR—Rights of Creditor — Appeal.——A creditor of a succession has a right to require the administration thereof to be conducted according to law, whether it is solvent or not. In such case the jurisdiction of the supreme court is governed by the amount of the fund to be distributed.—*Le Boeuf v. Webse*, S. C. La., Feb. 13, 1888; 4 South. Rep. 223.

140. EXECUTORS—Suit Against—Discharge.——When an executor resigns his trust pending a suit against him as such, and fails to plead his discharge, upon a verdict for plaintiff judgment should be entered against the defendant.—*Weddington v. Huey*, S. C. Ga., April 27, 1888; 6 S. E. Rep. 281.

141. EXTRADITION—Jurisdiction—U. S. Commissioner.——A United States court commissioner has jurisdiction to hear a complaint for forgery, made by a Mexican counsel against a fugitive from that country, and to commit the accused until a warrant for his surrender be issued.—*Benson v. McMahon*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1240.

142. EVIDENCE—Tespass to try Title—Hearsay.——Plaintiff's grantor obtained from B, defendant's grantor, a land certificate, made the survey and received the patent in his own name, and, as claimed by plaintiff, subsequently for a valid consideration received from B, a deed for half the land, which deed was afterwards lost. The declarations of B, testified to by his sons, relative to his disposition of the certificate, is inadmissible as hearsay.—*Reed v. Appleby*. S. C. Tex., April 27, 1888; 8 S. W. Rep. 288.

143. FACTORS—Authority—Liability.——When a consignee of goods of different qualities only authorized to sell the whole in one lot, at a limited price per ton, sells a part of average quality at a price above the limit, but does not sell the remainder, he is liable to account to the consignor for the whole at the price limited.—*Levison v. Balfour*, U. S. C. C. (Cal.), March 19, 1888; 34 Fed. Rep. 382.

144. FACTORS—Brokers—Sale.——Where goods are consigned for sale to a factor without instructions as to price, a factor has a right in his discretion to sell them for the best price he can obtain.—*Conway v. Lewis*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 826.

145. FORCIBLE—Entry and Detainer—Demand for Possession.——A notice to remove from and deliver up possession of a building, given to the owner of the land after the separation of a lease of the ground, is not a sufficient demand, under the California act of forcible entry and detainer—*Tienen v. Monahan*, S. C. Cal., May 14, 1888; 18 Pac. Rep. 144.

146. FRAUDULENT CONVEYANCES—Assignment—Intent.——In order to avoid a transfer, under Texas law, on the ground that it was made in contemplation of an assignment must have been then formed, and it is not sufficient that the grantor then had the assignment under consideration.—*Simmons H. Co. v. Kaufman*, S. C. Tex. April 24, 1888; 8 S. W. Rep. 283.

147. FRAUDULENT CONVEYANCES—Husband and Wife.——A bond and mortgage executed and delivered by a husband to his wife, as a security for money borrowed from her is not forbidden by Const. S. C., art. 14, § 8.—*Gerald v. Gerald*, S. C. S. Car., April 7, 1888; 6 S. E. Rep. 290.

148. FRAUDULENT CONVEYANCES—Innocent Grantee.——When a grantee is a *bona fide* purchaser for value without actual or constructive notice of plaintiff's claim, a bill to set aside his conveyance for fraud will be dismissed, though some intermediate conveyances between the debtor and such grantee may be tainted with fraud.—*Halversan v. Brown*, S. C. Iowa, May 12, 1888; 38 N. W. Rep. 123.

149. GARNISHMENT—Mortgagor.——Where garnishment notice is served on one indebted to the defendant by note secured by mortgage, the effect of such notice is to transfer to the plaintiff the right to collect the note and foreclose the mortgage.—*Alsdorf v. Reed*, S. C. Ohio. March 27, 1888; 17 N. E. Rep. 73.

150. GARNISHMENT—Municipal Corporations.——Under Colorado laws, municipal corporations can be garnished on judgments obtained in district courts.—*City of Denver v. Hanover*, S. C. Colo., May 4, 1888; 18 Pac. Rep. 214.

151. GARNISHMENT—Summons—Partnership.——Where a garnishment is served upon one member of a firm—the other being out of the State, it does not hold notes in the hands of that other who may surrender them to the defendant, although he has been previously notified of the garnishment.—*Bowen v. Pope*, S. C. Ills., May 9, 1888; 17 N. E. Rep. 64.

152. GARNISHMENT—Trustee Process.——A draft upon the United States treasurer payable to the order of a citizen of New York, who is not served with process, is subject to garnishment or trusted process in the hands of a citizen of Massachusetts who is entitled to deduct what is due to him.—*M'Cann v. Randall*, S. J. C. Mass., May 1, 1888; 17 N. E. Rep. 75.

153. GUARDIAN—Judicial Discretion — Probate Court.——Under the statute of Indiana a wide discretion is allowed to probate courts as to the removal of guardians and the ruilings of those courts will not be disturbed unless there has been a manifest abuse of the discretion.—*Pernhamer v. Miller*, S. C. Ind., May 12, 1888; 17 N. E. Rep. 115.

154. GUARDIAN AND WARD—Appointment—Liability of Judge.——Under Kentucky law, a judge who allows a guardian to qualify on his signing another's name as surety to his bond, representing that he had verbal authority to sign for him, it appearing that he had no such authority and the act was never ratified, is liable for injury resulting to the ward's estate by reason of such guardian having been allowed to qualify without surety.—*Com. v. Netherland*, Ky. Ct. App., May 1, 1888; 8 S. W. Rep. 272.

155. GUARDIAN AND WARD — Surety—Statute.——Under the statute of Indiana a surety on a guardian's bond cannot be held liable for more than the penalty of the bond, although the statute provides certain penalties to be added to the amount of the indebtedness.—*Meadows v. State*, S. C. Ind., May 15, 1888; 17 N. E. Rep. 121.

156. GUARANTY NOTE — Consideration — Notice.——Lack of consideration of a note is admissible to reduce the liability of a guarantor of payment when due, when the guarantor was a stranger to the original contract and received no benefit from his guaranty. Neither demand upon nor suit against the maker, nor notice of non-payment to the guarantor, is necessary to hold the latter.—*Carroll Co. S. Bank v. Strother*, S. C. S. Carol. April 19, 1888; 6 S. E. Rep. 313.

157. HABEAS CORPUS—Bastardy — Commitment.——A commitment of a putative father for failure to comply with the order of the court in a bastardy case will not be received in *habeas corpus* proceedings.—*Ex parte Donahoe*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 28.

158. HABEAS CORPUS—Commitment — Authority.——When a person has been committed for disobedience of an order made in proceedings in aid of execution, if the officer had authority, upon *habeas corpus* the order cannot be inquired into, although they may be irregular and erroneous. — *In re Morris*, S. C. Kan., April 7, 1888; 18 Pac. Rep. 171.

159. HIGHWAYS—Establishment—Hearing.——A petition for the establishment of a county road may be presented for hearing at an adjourned or extra session of the board of county commissioners, provided the thirty

days' notice thereof has been given as required by statute.—*Burkelo v. County Commrs.*, S. C. Minn., May 25, 1888; 38 N. W. Rep. 108.

160. HIGHWAYS—Obligation to Repair — Liability.——A person who has by contract with public authority, assumed obligations to keep a public highway or other public place in repair, may be held liable to one who has been especially injured by his failure to perform such obligation.—*Weymouth v. City of New Orleans*, S. C. La., March 26, 1888; 4 South Rep. 218.

161. HIGHWAYS— Rejecting Report — Reconsideration. ——When a board of county commissioners rejects the report of viewers to locate a public road, it may at the same session reconsider its action and continue further action to a future day of that session.—*Higgins v. Curtis*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 207.

162. HIGHWAYS—User — Dedication—Time.—— On an indictment for obstructing a highway, the fact that the public used the road is competent evidence to prove the acceptance of the right of way, where a dedication is alleged to have been made by the owner. Lapse of time is not essential to the establishment of a highway by dedication.—*State v. Birmingham*, S. C. Iowa, May 11, 1888; 38 N. W. Rep. 121.

163. HOMESTEAD — Appraisement. —— Upon the appointment of three appraisers by the court to set off a homestead under Gen. St. S. C. § 1994, a return by two appraisers, all acting together and one dissenting from the return, is valid.— *Carolina S. Bank v. Evans*, S. C. S. Car., April 23, 1888; 6 S. E. Rep. 321.

164. HOMESTEAD—Right of Widow.——Under Virginia laws, the widow of an intestate, who has during his life-time set apart real estate as a homestead and who left no debts, cannot claim such homestead, after his death, against his heirs.—*Barker v. Jenkins*, S. C. Ap. Va., May 10, 1888; 6 S. E. Rep. 459.

165. HOMESTEAD—What is.——The test of a homestead is whether the house is actually used as the residence of the family. It is also used as a place of business, it will not therefor cease to be a homestead if the part so used would be necessary or convenient for the use of the family independent of the business.—*Bebb v. Crowe*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 223.

166. HUSBAND AND WIFE—Her Note—Consideration. ——A wife gave her own note to her husband's creditor in return for the surrender of his past due paper: *Held*, there was sufficient consideration for her note.—*Osborne v. Doherty*, S. C. Minn., May 21, 1888; 38 N. W. Rep. 111.

167. HUSBAND AND WIFE—Marriage Settlements.—— An absolute deed, whereof the actual consideration, though not expressed, is a contemplated marriage, afterwards consummated, is not a maraiage settlement or contract within the meaning of Code N. C., § 1269.—*Sullivan v. Powers*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 895.

168. HUSBAND AND WIFE—Separate Estate—Liability for Debt.—— When a suit in equity is instituted to subject the separate personal estate of a married woman to a debt, where no attachment is issued or lien acquired thereon before the suit is brought, two of the judges hold that a purchaser thereof for value and without fraud, is not liable therefor to the plaintiff, and one judge holds that he is if he purchases after summons is served on her.—*Bueff v. Thompson*, S. C. App. W. Va., Feb. 18, 1888; 6 S. E. Rep. 352.

169. INFANCY — Ratification. —— Where a daughter promised to pay her mother the expenses of her education out of a legacy that she (the daughter) had, and on coming of age reiterated her desire to go on with her studies in the same way: *Held*, that these latter declarations ratified the promises made by the daughter during her minority to reimburse her mother for those expenses.—*Hatch v. Hatch*, S. C. Vt., April 25, 1888; 13 Atl. Rep. 791.

170. INJUNCTION — Jurisdiction—Summons.——Under North Carolina law, an injunction may issue before service of the summons, and notice of it to the defendant gives the court jurisdiction of him as to it.—*Fleming v. Patterson*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 896.

171. INSANITY—Criminal Law—Evidence.——It is not proper to admit in evidence proof of the dreams of defendant in support of the plea of insanity, such dreams tending to indicate that the prisoner was haunted by the spirit of his wife who, as he alleged, required him to kill the deceased in revenge of his wrongs to her.—*Spencer v. State*, Md. Ct. App., April 18, 1888; 13 Atl. Rep. 809.

172. INSOLVENCY —Preferences — Lex Rei Sitæ.——In proceedings under the insolvent act for the appointment of a receiver of the estate of a non-resident insolvent, doing business and owning property in this State, upon the ground that by a conveyance of personal property in this State he had preferred one creditor, the preferential character of the conveyance, and whether it constituted an act of insolvency must be determined by the law of this State and not by the law of the State where it was made.—*In re Peck*, S. C. Minn., May 14, 1888; 38 N. W. Rep. 104.

173. INSURANCE — Application.——Where the statements of an application for insurance are made by the insured "to the best of his knowledge and belief," the company cannot show that the statements were false, but must also show that they were known to be false.—*Clapp v. Massachusetts, etc. Co.*, S. J. C. Mass., April 6, 1888; 16 N. E. Rep. 433.

174. INSURANCE — Conditions — Waiver.——When the insured has failed to keep his books of invoice secure from fire as required by his policy, the company waives the condition by requiring him after the fire to incur the trouble and expense of obtaining bills and vouchers for all his goods received for several years before.—*Brown v. State I. Co.*, S. C. Iowa, May 14, 1888; 38 N. W. Rep. 135.

175. INSURANCE — Incumbrances — Taxes. —— In a policy of fire insurance a warranty concerning incumbrances of all kinds, includes only incumbrances created by the act or consent of the parties, and does not include delinquent taxes.—*Hosford v. Hartford F. Co.*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1202.

176. INSURANCE—Mutual Benefit—Assessment—Notice. ——In an action on a mutual life insurance company certificate, conditioned that failure to pay the assessment within thirty days after notice shall avoid it, it appeared that the notices for three members of a family were inclosed in one envelope, and received by one of them, the mailing being proved only by the usual course of the company's business: *Held*, that a finding that notice was not mailed to the insured would not be disturbed.—*Garretson v. Equitable, etc.*, S. C. Iowa, May 12, 1888; 38 N. W. Rep. 127.

177. INSURANCE — Pleading.——A declaration which stated that the defendant company had insured the house of the assured, and bound itself by a policy of insurance to make good to the assured all loss to the property occurring by fire to the property, and that a loss did occur and that the plaintiff was the assignee of the assured, states a good cause of action.—*Searle v. Gardner*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 835.

178. INTOXICATING LIQUORS.—Druggist's License.—— It is competent for a druggist to give in evidence to explain his possession of liquors, that at the time of their seizure he had applied for a druggist's license to sell them, and that five days afterwards that license was granted.—*Commonwealth v. Wellington*, S. J. C. Mass., May 3, 1888; 16 N. E. Rep. 446.

179. INTOXICATING LIQUORS—Former Conviction.—— In New Hampshire, an indictment for unlawfully selling intoxicating liquors must be found within one year after the offense is committed, but it is not necessary that a former conviction given in evidence to increase the penalty should also have been had within one year. —*State v. Adams*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 785.

180. INTOXICATING LIQUORS — Indictment — Place of Sale. —— In an indictment for selling intoxicating

liquors without a license, it is not necessary to allege the place of the sale.—*State v. Cottrill*, S. C. App. W. Va., Feb. 28, 1888; 6 S. E. Rep. 428.

181. INTOXICATING LIQUORS—State Law—United States License. ——That one is a licensed distiller under United States laws, and the whisky sold his own manufacture, affords no immunity for a sale contrary to State law.—*State v. Hazell*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 404.

182. JUDGMENT — Assignment ——The holder of a judgment obtained after the voluntary assignment of the debtor, is entitled to file his claim and share in the distribution of the assets.—*Second, etc. Co. v. Townsend*, S. C. Ind., May 15, 1888; 17 N. E. Rep. 116.

183. JUDGMENT—Collateral Attack — Injunction.—— Where an appeal from a justice of the peace has been dismissed by the county court for lack of jurisdiction, such judgment of the county court is conclusive till reversed, and cannot be attacked by an action to enjoin an execution on the justice's judgment.—*Roberts v. McCamant*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 513.

184. JUDGMENT—Conclusiveness—Prior Grantee.—— When a prior grantee and purchaser under execution sale is sued by a subsequent judgment creditor of his grantor to set aside his deed as a fraud on creditors, he may show that the debt due such later judgment creditor had been satisfied before the judgment was obtained, and that such creditor had taken advantage of his debtor as to interest.—*Gottlieb v. Thatcher*, U. S. C. C. (Colo.), March 21, 1888; 34 Fed. Rep. 435.

185. JUDGMENT — Confession —Insolvency—Attorney—Fraud.——Circumstances stated under which it was held that a confession of judgment by an insolvent was fraudulent as to his other creditors, so far as it included attorneys' fees.—*Hulse v. Mershon*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 50.

186. JUDGMENT—Insanity.—— A judgment against an insane person is valid on collateral attack.—*Brittain v. Mull*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 382.

187. JUDGMENT—Res Adjudicata—Dismissing Appeal. ——One who has acquiesced in a judgment of the supreme court, dismissing for want of jurisdiction an appeal in a case wherein he was a party, and virtually deciding that the matter is within the exclusive jurisdiction of the court of appeals, cannot question the exercise of jurisdiction by the latter court.—*State v. McGuire*, S. C. La., March 5, 1888; 4 South. Rep. 222.

188. JUDGMENT—Res Adjudicata —Parties.——Where land subject to a mechanic's lien is conveyed in trust to secure a debt, and the lien is enforced by suit against the grantor only, the trustee (successor of the original trustee) not being a party to the action, the judgment in that action does not bind the trustee.—*Bannon v. Thayer*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 54.

189. JUDGMENT —Warrant of Attorney — Surplusage. ——Where a married woman gives her note to her husband J H, and with it a warrant of attorney to J H "& Bro.," to confess judgment on the note: *Held*, that a confession of judgment by J H is good, and that "& Bro." may be rejected as surplusage.—*Holmes v. Bemis*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 42.

190. JURISDICTION — Federal Courts —Assignment of Patents.——An action between parties, residents of the same State, to enforce the assignment of letters patent and for damages, does not lie within the jurisdiction of the federal courts.—*Wren v. Annin*, U. S. C. C. (N. Y.), March 12, 1888; 34 Fed. Rep. 435.

191. JURISDICTION—Federal Courts—Illegal Arrest.—— Pending extradition proceedings a fugitive from justice was forcibly carried into the State from which he had fled, and there arrested on legal warrant: *Held*, that the federal courts had no jurisdiction on petition by *habeas corpus* for his release.—*Mahon v. Justice*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1204.

192. JURISDICTION — Federal Courts — Patents and Copyrights.——The laws investing exclusive jurisdiction in federal courts in patent and copyright cases, regardless of the amount involved, have not been repealed.—*Miller-Magee, Co. v. Carpenter*, U. S. C. C. (Ohio), Feb. 29, 1888; 34 Fed. Rep. 433.

193. JURISDICTION—Service by Publication—Amendment.——After attachment made and service on the defendant by publication the plaintiff amended his petition by setting up an entirely new cause of action. Defendant did not appear: *Held*, that the judgment was void and subject to collateral attack.—*Stuart v. Anderson*, S. C. Tex., May 1, 1888; 8 S. W. Rep. 295.

194. JUSTICE OF THE PEACE—Jurisdictional Amount. ——When the amount sued for on a bond does not exceed $100, a trial justice has jurisdiction, under South Carolina law, though the penalty of the bond exceeds that amount.—*Cavender v. Ward*, S. C. S. Car., April 11, 1888; 6 S. E. Rep. 302.

195. JUSTICE OF THE PEACE—Levy—Place of Sale.—— When an officer seizes property under process issued by a justice of the peace in one township, and advertises and sells it in another, the sale is invalid as against the owner.—*Paulsen v. Hull*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 225.

196. JUSTICE OF THE PEACE—Revival of Judgment.—— A justice of the peace may revive a dormant judgment rendered by him by an action brought for that purpose, or by motion and notice.—*Schultz v. Hine*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 221.

197. JUSTICE OF THE PEACE—Verified Answer- Waiver. ——In a suit by A against B before a justice of the peace for labor performed, B answered that they are partners, and set out the entire business. A trial was had and judgment rendered; the answer was not verified and that was no reply: *Held*, that by going to trial without objection the want of a verification was waived. The judgment was affirmed.—*Ciesielski v. Nowacki*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 232.

198. LIENS—Crops— Specification of Land.——Where the written agreement for a lien on crops specified particularly the land to which the lien should attach, and also specified a lien on crops raised by the debtor on any other land in the county, the creditor cannot enforce his lien on crops sold to others, which were not raised on the particular land specified.—*Gwatheney v. Etheridge*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 411.

199. LIMITATIONS—Absence of Defendant.—— A defendant who is a non-resident of the State at the time the specification of the cause of action accrues, though he may return thereafter temporarily into the State on business, is not within Rev. St. Mo. 1879, art. 2 § 3236.—*Orr v. Wilmarth*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 258.

200. LIMITATIONS—Adverse Possession—Parol Gift.—— When one takes possession of property under a parol gift, which gives a right to a deed thereto immediately, the statute of limitations commence to run at once, and this defense in ejectment is not waived by setting up in the answer an equitable claim of title.—*International Bank v. Fife*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 241.

201. LIMITATION OF ACTION—Adverse Possession.—— Where a man gave by parol to his niece a house and lot but continued to pay taxes on it, and his sister occupied part of the house: *Held*, that the niece did not acquire a title by adverse possession.—*Duff v. Leany*, S. J. C. Mass., April 6, 1888; 16 N. E. Rep. 417.

202. LIMITATIONS OF ACTIONS—Death of Parties.—— The time between the death of a party and the appointment of his administrator is excepted from the statute of limitations in the case of the debtor, but is included the case of the creditor.—*Baird v. Reynolds*, S. C. N. Car., April 30, 1888; 6 S. E. Rep. 377.

203. MALICIOUS PROSECUTION—Advice of Counsel.—— Advice of counsel is no defense to an action for a tort committed on property, unless the advice was taken and followed in good faith; and not then, except as to exemplary damages.—*Chambers v. Upton*, U. S. C. C. (Mich.), March 14, 1888; 34 Fed. Rep. 473.

204. MARINE INSURANCE—Perils of the Sea- Explosion. ——When a vessel becomes unmanageable by reason

of the explosion of the boiler and within a few moments thereafter sinks, such loss is not within the meaning of perils of the sea, under California law.—*Miller v. California I. Co.*, S. C. Cal., May 15, 1888; 18 Pac. Rep. 155.

205. MARITIME LIENS — Supplies — Home Port.——A month after the hull of a boat was built and her engines put in, the libelant supplies her with stores and an outfit, at the request of one of her owners, who resided there: *Held*, that he was not entitled to a maritime lien. —*The Glenmont*, U. S. C. C. (Minn.), March 13, 1888; 34 Fed. Rep. 402.

206. MARITIME LIENS—Supplies—Home Port.——There is no implied maritime lien against a vessel for supplies furnished to her at her home port, which is the residence of her owner, though she has a foreign register. The lien exists when the goods are sent from the home port to the vessel elsewhere. Taking a draft for supplies furnished a vessel in a foreign port is not a surrender of the right to a lien, which passes to the indorsee of the draft.—*The Chelmsford*, U. S. D. C. (Penn.), Feb. 27, 1888; 34 Fed. Rep. 399.

207. MASTER AND SERVANT—Damages for Death.—— Circumstances stated under which it was held to be a question for the jury whether a coal company which had employed a boy who was killed while in its service was guilty of negligence in providing for his safety.—*Pennsylvania, etc. Co. v. Nee*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 841.

208. MASTER AND SERVANT—Incompetence.——A railroad company is responsible for personal injuries and other damages sustained by reason of the incompetence of its conductors.—*Evansville, etc. Co. v. Guyton*, S. C. Ind., May 10, 1888; 17 N. E. Rep. 101.

209. MASTER AND SERVANT—Negligence.——Circumstances stated under which it was held that a railroad company was responsible in damages to an employee for personal injuries caused by the company's permitting a train to run upon its track with no one in charge of it.—*Chicago, etc. Co. v. Krueger*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 52.

210. MECHANIC'S LIEN—Contractor's Bond—Notice.—— Though the owner of a building has procured and filed the bond of his contractor and posted the notice according to law, a subcontractor is entitled to a lien, if such notice was not posted about the premises during any part of the time, when he performed labor and furnished materials for the building.—*Krans v. Murphy*, S. C. Minn., May 15, 1888; 38 N. W. Rep. 112.

211. MECHANIC'S LIEN—Suit—Parties.——In an action for the foreclosure of a mechanic's lien, all lien-holders and incumbrancers may be made parties, and all the issues in the case may generally be tried in one trial and before one jury.—*Sharon T. Co. v. Morris*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 230.

212. MINES—Tunnel Claims—Lodes.——In an action to recover a mining claim, based on the right to a tunnel claim, a statement in the complaint that all the lodes in the tunnel claim have been worked and mined by the plaintiff and his grantors, sufficiently describes the lodes. All mineral locations are to be governed by the local rules and customs in force at the time of location, when made prior to the passage of any mineral law by congress.—*Glazier, M. S. M. Co. v. Willis*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1214.

113. MORTGAGE—EQUITY—JURY TRIAL.—Where in an action on a note and mortgages the defendant's wife filed a counterclaim setting up her title to the land as a gift from her father, the issue is equitable and a jury trial is improper.—*Johnson v. Johnson*, S. C. Ind., May 11, 1888; 17 N. E. Rep. 111.

214. MORTGAGE—Foreclosure—Reservation of Lien.—— When the petition for foreclosure recites the notes secured, and states that some of them are not due, and demands judgment for the amount due and foreclosure of said mortgage for amount of said judgment and for sale of said real estate on special execution, and the original notice follows the prayer of the petition, the court may preserve the mortgage lien as to the unpaid notes in the decree of foreclosure and drop the case from the docket.—*Burroughs v. Ellis*, S. C. Iowa, May 16, 1888; 38 N. W. Rep. 141.

215. MORTGAGE — Lien — Priority. —— Circumstances under which the lien of a material-man was held to be superior (although not recorded) to the lien of a judgment creditor of the subsequent vendee.—*Bradley v. Bryan*, N. J. Ct. Chan., October Term, 1887; 13 Atl. Rep. 806.

216. MUNICIPAL CORPORATIONS—Defective Sidewalks. ——For a plaintiff to recover for injuries caused by a defective sidewalk, it is not necessary that he should prove actual notice to the city of the defect; it is sufficient to show the defect had existed for so long a time that the city officers might, by reasonable diligence, have discovered it.—*City of Sterling v. Merrill*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 6.

217. MUNICIPAL CORPORATIONS—Livery Stable Keepers —License Tax.——A city ordinance imposing a tax of a certain amount on all livery stable keepers is not void for lack of uniformity, nor because it is not proportioned to the value of the property and the extent of the licenses.—*State v. Powell*, S. C. N. Car., May 18, 1888; 5 S. E. Rep. 624.

218. MUNICIPAL CORPORATIONS—Police Power—Delegation.——The city may authorize a party to erect towers to carry wires and cables for electric purposes, and may delegate to him its police power to remove obstructions. It is known when and where the policy power of a state begins, but not where it ends. Under it a man's property may be taken from him, his liberty may be shackled, and his person and life imperiled, in cases of great public exigencies.—*New Orleans G. L. Co. v. Hart*, S. C. La., May 7, 1888; 4 South Rep. 215.

219. MUNICIPAL CORPORATIONS—Streets—Repairs.—— A municipal corporation of the first class must keep its streets in repair without an express statutory provision, which includes bridges thereon, though the county originally contributed to their purchase. —*Shawnee County v. Topeka City*, S. C. Kan., April 7, 1888; 18 Pac. Rep. 161.

220. MUNICIPAL CORPORATIONS — Street Assessments— Evidence.——In an action to foreclose a street assessment it appears that a certain street had been graded about 20 years before, and that the difference between the official grade and the existing grade no where exceeded one and three-fourth feet: *Held*, that this was not sufficient to overcome the presumption, under California law, that official duty has been regularly performed.—*Fanning v. Bohme*, 8 S. C. Cal., May 15, 1888; 18 Pac. Rep. 158.

221. MUNICIPAL CORPORATIONS — Street Improvements —Assessments.——Under California law, an assessment by a street superintendent, which was partly for work done and partly for work on a sidewalk which had never been performed, is not void for want of jurisdiction.—*Blair v. Luning*, S. C. Cal., May 14, 1888; 18 Pac. Rep. 153.

222. MUNICIPAL CORPORATIONS — Street Sprinkling — Assessment ——Street sprinkling is a local improvement, for which under the constitution an assessment may be levied on property fronting on the street in proportion to its lenial feet frontage.—*State v. Reis*, S. C. Minn., May 1, 1888; 38 N. W. Rep. 97.

223. NEGLIGENCE — Contributory Negligence. —— A passenger who jumps from a moving train to avoid being carried past his point of designation is guilty of contributory negligence.—*Reibel v. Cincinnati, etc. Co.*, S. C. Ind., May 11, 1888; 17 N. E. Rep. 107.

224. NEGLIGENCE—Dangerous Premises—Instructions. ——Where in an action for injuries resulting from the overturning of plaintiff's wagon from a bridge, caused by a ditch wrongfully dug by defendant in the highway, the complaint and answer allege, that plaintiff was thrown from the wagon, an instruction, that if plaintiff without negligence drove off the bridge and was thereby thrown from the wagon and injured, is correct, although plaintiff testified that he leaped from the wagon

as it overturned.—*Lewis v. Riverside W. Co.*, S. C. Cal., May 22, 1888; 18 Pac. Rep. 314.

225. OFFICE—Contest—Fees. —— Where plaintiff was ousted by legal proceedings from an office by A, who resigned pending an appeal, and B was appointed in his place, upon whom plaintiff made no demand, till the final decision, when the office was promptly surrendered him, plaintiff cannot recover from B the fees received by him during his incumbency.—*Nichols v. Branham*, S. C. App. Va., May 17, 1888; 6 S. E. Rep. 463.

226. OFFICER—Compensation — Default. —— When a trustee has appropriated funds unlawfully neither he nor his sureties can demand compensation for his services. — *Hethets Co., v. Harrison etc., Co.*, S. C. Ind., May 12, 1888; 17 N. E. Rep. 113.

227. OFFICES— Trying Title — Quo Warranto.—— *Quo warranto*, but not injunction, is the proper remedy to determine the title to an office.—*Neeland v. State*, S. C. Kan., April 7, 1888; 18 Pac. Rep. 165.

228. PARENT AND CHILD. —— Loose declarations by a parent expressive by gratitude of care taken during illness of the parent by the child and of a hope that he or she would be compensated therefor, do not constitute a contract to pay for such services. — *Derick v. Arnold*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 831.

229. PARTIES — Misnomer — Evidence. —— Circumstance stated under which it was held that where process was served upon the agent of a railroad corporation, that corporation was the true defendant, although in the process it was misdescribed by the title of defunct preceeding railroad company. — *Pennsylvania Co., v. Sloan*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 37.

230. PARTNERSHIP — Duties of Survivor. —— The surviving partner in a cotton plantation, when not otherwise authorized by the articles of partnership or by the will of the deceased partner, can only continue the partnership together and sell the growing crop.—*Clay v. Field*, U. S. D. C. (Miss.), March 22, 1888; 34 Fed. Rep. 375.

231. PARTNERSHIP— Patent-right — License. —— Circumstances stated under which a license to make barbed wire under a patent, which had been issued to one of several partners was *held* to have been put into the partnership by him and to have become partnership property. — *Scutt v. Robertson*, S. C. Ill., May 9, 1888; 17 N. Rep. 14.

232. PARTNERSHIP—Surety—Presumption. —— When a firm name is used as surety for a third person, the presumption is that such use is outside of the firm business, and the burden of proving liability or ratification is on the person asserting the liability of the partners who have not signed.—*Fore v. Hittson*, S. C. Tex., April 27, 1888; 8 S. W. Rep. 292.

233. PARTNERSHIP — Surviving Partner — Suit. —— A surviving partner can sue on a note due the firm without joining the personal representatives of the deceased partner. — *Dial v. Agnew*, S. C. S. Car., April 7, 1888; 6 S. E. Rep. 295.

234. PATENTS—Attack—Mexican Grant. —— A patent from the United States may be attacked in ejectment by showing that the land is a portion of a prior Mexican grant, which was confirmed by the United States land commissioners and on appeal by the district and supreme courts.—*Doolan v. Carr*, U. S. S. C. Nov. 21, 1887; 8 S. C. Rep. 1228.

235. PATENTS FOR INVENTIONS — Honey Frames. —— Patent 243,674 to James Forncrook for sectional honey frames is void, so far as the manufacture by bending and uniting the ends of a blank consisting of a single piece is concerned. The adaption of a honey frame for the use of comb foundations by putting pieces of wax on it is no infringement of this patent. — *Forncrook v. Root*, U. S. S. C. April 23, 1888; 8 S. C. Rep. 1247.

236. PATENTS FOR INVENTIONS — Injunctions — Prior Adjudications. —— When a patent has been adjudged valid in other suits to the extent of covering a certain process, when the springs are kept below red heat, in an application for a preliminary injunction for infringement the patent will be presumed to be valid to that extent.—*Carey v. Miller*, U. S. C. C. (N. Y.), March 6, 1888; 34 Fed. Rep. 392.

237. PATENTS FOR INVENTIONS— Jacquard Looms.—— Patent 185,027 to Thomas Halton for Jacquard looms is void.—*Halton v. Whillinger*, U. S. C. C. (Pa.), Jan. 17, 1888; 34 Fed. Rep. 390.

238. PATENTS FOR INVENTIONS — Patents for Separate Parts—Repairs.——When different parts of a machine are covered by separate patents, a purchaser of such machine from the patentee, who replaces one of the parts or elements covered by an individual patent, when worn out, is guilty of an infringement.—*Singer M. Co. v. Springfield, F Co.*, U. S. C. C. (Mass.), April 2, 1888; 34 Fed. Rep. 393.

239. PEDDLERS—License Tax — Manufacture.——Admixture by boiling together certain drugs to form a nostrum is not a process of manufacture, under North Car olina law exempting from peddler's tax those selling goods of their own manufacture.— *State v. Morrell*, S. C. N. Car., May 7, 1888; 6 S. E. Rep, 418.

240. PLEADING — Amendment — Judgment on Appeal. ——A enjoined B from selling land under execution, having a prior recorded mortgage thereon and a subsequent deed thereof in satisfaction of the mortgage. On appeal it was held that A had lost his rights by the subsequent deed: *Held*, thereafter A would not be allowed to amend his complaint to assail the validity of the judgment. — *Bleekley v. Brangan*, S. C S. Car., April 7, 1888; 6 S. E. Rep. 291.

241. PLEADINGS—Averments—Receiver.——A petition for the appointment of a receiver under Gen. Laws 1881, ch. 148 § 2, which states that by means of a conveyance particularly described an alleged insolvent gave one creditor a preference, and such conveyance was made for that purpose, is sufficient, the petition being adequate in other respects. — *In re Green's Estate*, S. C. Minn., May 21, 1888; 38 N. W. Rep. 111.

242. PLEADING — Counterclaim — Third Party. —— A counterclaim, in an answer after a general denial, against the plaintiff's husband, who is not a party to the suit, should be striken out.— *Parker v. Cochran*, S. C. Colo., May 11, 1888; 18 Pac. Rep. 209.

243. PLEADINGS—Insurance — Proof.—— In an action on a life insurance policy, where plaintiff alleges that the insured complied with all the conditions of the policy with which he did not comply, the evidence should be confined to the latter.—*Roach v. Kentucky M. S. F. Co.* S. C. S. Car., April 6, 1888; 6. S. E. Rep. 286.

244. PLEADING — Mines — Description. —— The provisions of State statutes, as to the description of mines by metes and bounds had been held to be only directory, and a description by name, when the property is well known, is often sufficient.—*Glacier M. S. M. Co. v. Willis*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1214.

245. PLEADING—Parties— Vendor and Vendee. —— In an action by an administrator against a vendee to recover the purchase money due on a bond for title by a sale of the land, the vendor's heirs are necessary parties. — *Grubb v. Lookabill*, S. C. S. Car., April 30, 1888; 6 S. E. Rep. 390.

246. PLEADINGS—Recovery of Land—Contract for Purchase. —— In an action to recover possession of land, defendant answered that plaintiff, representing himself to be the sole heir of the owner, then deceased, had contracted to sell it to A, who went into possession, that under the same representations to him by plaintiff he purchased A's interest, that in fact plaintiff owned only an individual third: *Held*, that the court erred in sustaining exceptions to the answer.—*Bryan v. Hennick*, S. C. Tex., April 20, 1888; 8 S. W. Rep. 282.

247. PLEADING—Sustaining Judgment — Construction. On a question whether the pleadings sustain the judgment rendered, the pleadings must be given the most favorable construction possible to sustain the judgment.—*Kansas City, etc. R. R. v. Farnsworth*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 202.

248. POWERS — Testamentary — Devise.——Where a te stator devises certain land to his executors in trust

with power to sell and convey wherever they shall think it advisable to do so, a sale will not be ordered till the persons named renounce the trust.—*In re Van Brocklin's Estate*, S. C. Iowa, May 12, 1888; 38 N. W. Rep. 119.

249. POWERS — Testamentary — Sale of Land. —— A power under a will, to sell and convey any portion of my estate not devised to my four first-named children, is unrestricted, except as to property specially devised to said children.—*White v. Guthrie*, Ky. Ct. App., May 5, 1888; 8 S. W. Rep. 274.

250. POWERS—Attorney — Requisites — Deeds.—— In North Carolina, a power of attorney to convey land must be under seal. A deed by an attorney must purport to be a conveyance by the principal, executed by his attorney, and must in express terms convey his estate.—*Coddell v. Allen*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 399.

251. PRACTICE—Attachment—Debt not Due.—— When suit is brought and attachment issued on a note not yet due, under South Carolina law, the subsequent abatement of the attachment does not affect the suit.—*Light v. Isear*, S. C. S. Car., April 6, 1888; 6 S. E. Rep. 284.

152. PRACTICE — Bill of Exceptions.——The date of presentation of a bill of exceptions to the judge for his signature must be stated in the bill; it is not sufficient that it be indorsed thereon.—*Buchart v. Burger*, S. C. Ind., May 17, 1888; 17 N. E. Rep. 125.

253. PRACTICE — Filing Pleading — Waiver.——When defendant's objection, that the petition was not filed in the time fixed by the notice, as required by Code Iowa, § 2600, is overruled, and he answers over, he waives the objection.—*Paddleford v. Cook*, S. C. Iowa, May 16, 1888; 38 N. W. Rep. 137.

254. PRACTICE — Misconduct of Jury.—— Where the affidavits of jurors show, that one of their number stated that to his own knowledge the land in controversy was very poor, and that his statement influenced their verdict, for which purpose it was made, the verdict should be set aside.—*Griffin v. Harriman*, S. C. Iowa, May 16, 1888; 38 N. W. Rep. 139.

255. PRACTICE—New Trial—Verdict.——Though facts presented on the trial would have induced the court to sustain defendant's demurrer setting up that the contract was unconstitutional, yet, when the jury have found a fact against the defendant, upon which the supreme court may hold him liable, and all the facts are preserved in the bill of exceptions, the motion for a new trial will be overruled.—*Cahn v. Kensler*, U. S. C. C. (Mo.), March 16, 1888; 34 Fed. Rep. 472.

256. PRACTICE — Reference — Statute. —— Under the statute of Pennsylvania, it is competent for a court, with the consent of parties, to refer a cause to a referee, whose report shall have the effect of the verdict of a jury, but if it appears that the referee made a mistake the court may re-refer the cause to the same referee for further report.—*Rank v. Rank*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 829.

257. PRACTICE—Trial — Argument of Counsel.——An attorney in his argument to the jury should confine himself to the issues and evidence in the case, and it is duty of the court to see that he does so, and statements made outside of the case may be sufficient to set the verdict aside.—*Missouri P. R. R. v. Metzger*, S. C. Neb., April 26, 1888; 38 N. W. Rep. 27.

258. PRACTICE—Trial—Experts.——In an action by a city to recover from a property holder the amount which his property has been benefitted by the widening of a street, a charge for plaintiff that, in determining the amount, the testimony of experts, if deemed unreasonable, may be disregarded, is not error.—*City of St. Louis v. Ranken*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 249.

259. PRACTICE—Trial—Special Findings.——When the jury, instead of answering certain interrogatories yes or no, give answers from which it is impossible to determine whether they accord or conflict with the general verdict, a new trial should be granted.—*Fisk v. Chicago, etc. R. R.*, S. C. Iowa, May 14, 1888; 38 N. W. Rep. 132.

260. PRINCIPAL AND SURETY—Discharge.——Where a debtor produces the money and offers to pay his debt and the creditor refuses to accept payment the sureties are discharged.—*Spurgeon v. Smitha*, S. C. Ind., May 10, 1888; 17 N. E. Rep. 105.

261. PRINCIPAL AND SURETY — Liability — Terms.—— Where upon an appeal in a forcible entry and detainer case from a justice, a new bond upon pain of dismissal is ordered to be given at once, and the bond so given is prospective in its terms, the sureties are not liable for use and occupation prior to the time when the bond was given. They can stand on the exact letter of their contract.—*Henne v. Buck*, S. C. Kan., May 6, 1888; 18 Pac. Rep. 228.

262. PUBLIC LANDS—Railroad Grants—Vesting Title. ——Under an act of Congress granting land to a State to aid in the construction of a railroad, providing that if any such land is entered the agent of the governor might select other land in lieu thereof, subject to the approval of the secretary of the interior, the title to such other land does not pass till selection and approval.—*Musser v. MRal*, S. C. Minn., May 14, 1888; 38 N. W. Rep. 103.

263. QUIETING TITLE — Public Lands — Title.——One who has proved up under the preemption laws and obtained the receiver's receipt has not such title as will support an action to quiet title against one claiming under a similar right—*Fantongeren v. Heffernan*, S. C. Dak., May 8, 1888; 38 N. W. Rep. 52.

264. QUO WARRANTO—Practice.——Upon an application for leave to file an information in the nature of a *quo warranto*, a rule *nisi* may be entered and counter-affidavits may thereupon be filed.—*People v. Mac Fall*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 63.

265. RAILROADS—Consolidation — Forfeiture.——The consolidation of two railroads or the leasing of one to another is authorized in Nebraska only when they together will form a continuous line without break or interruption. When a railroad without authority of law leases its road to another with all its rights, property and franchises for a long period of time, it is subject to forfeiture.—*State v. Atchison & W. R. R.*, S. C. Neb., April 25, 1888; 38 N. W. Rep. 43.

266. RAILROAD CROSSING—Fences—Gate.——A railroad company who has put gates on its fences for the conveniences of the proprietor of the land at a private crossing is not bound to keep such gates in repair.—*Evansville, etc. Co. v. Mosier*, S. C. Ind., May 11, 1888; 17 N. E. Rep. 109.

267. REGISTER OF DEEDS — Examination of Records. ——Who has an interest in the information contained in the public records of a county office may examine them and make copies, abstracts or memoranda thereof. —*Boylan v. Nonen*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 174.

268. REMOVAL OF CAUSES—Record—Jurisdiction.—— When a suit for possession of land and for rents alleged to be of the value of $2,500 is brought in a State court, and is tried in a federal court, and there is nothing in the record to show the jurisdiction of the latter court, except a short stipulation by the parties that more than $5,000 is involved, a judgment for the defendant will be set aside for want of jurisdiction.—*Hegler v. Faulkner*, U. S. S. C., May 16, 1888; 8 S. C. Rep. 1203.

269. REPLEVIN — Bond — Sureties.——Under Georgia law, a plaintiff in attachment may take judgment on the replevy bond given by the defendant and his sureties, and the latter are bound, though they were not served and did not appear,—*Craig v. Herring*, S. C. Ga., May 4, 1888; 6 S. E. Rep. 283.

260. REPLEVIN — Seizure by Officers—Proof.——In a suit in replevin against an officer, who has seized property under judicial process, the officer must show his official character and the proceedings and process under which he acted to sustain a judgment in his favor.—*Arn v. Parker*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 201.

271. REPLEVIN—Surety—Statute.——Where one was replevin bail for a debtor and execution was issued against him and his principal and levied upon his prop-

erty: *Held*, that although the plaintiff in that action was bound to exhaust the property of the principal before resorting to that of the surety, replevin was not the proper remedy for the latter.—*Miller v. Hudson*, S. C. Ind., May 16, 1888; 17 N. E. Rep. 122.

272. RES ADJUDICATA—Admissions—Finding.——When the court has found in open court the parties agreed that the matters concerning a certain crop had been settled between them, and the pleadings were broad enough to include the matters, such findings will be considered as *res adjudicata* as to such matters, although no evidence was introduced in such suit thereon.—*Townsden v. Shrader*, S. C. Kan., May 4, 1888; 18 Pac Rep. 186.

273. RIPARIAN RIGHTS—Accretion.——Where by accretion new land is formed in front of the lands of two conterminous riparian proprietors, the new land must be divided between them in proportion to the shore line drawing straight lines from the old lines to the new shore lines.—*Watson v. Home*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 789.

274. SALE—Failure of Consideration — Evidence.——In a suit on a note given for the price of a machine, defendant may introduce evidence to show the worthlessness of the machine to sustain a defense of failure of consideration, without having laid the foundation for proving by oral testimony the contents of a written warranty elsewhere alledged in the answer.—*Aultman, etc. T. Co. v. Trainer*, S. C. Iowa, May 12, 1888; 38 N. W. Rep. 126.

275. SALE—Price—Warranty.——A sale of personal property in the seller's possession for a fair price implies a warranty of title, unless it is shown by the facts and circumstances of the sale that the seller intended only to transfer such interest as he had. If the title fail in a case of implied warranty, the purchaser may recover the money paid.—*Paulsen v. Hall*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 225.

276. SALOONS—Shipwrecked Sailors.——A vessel encountered severe weather and threw off part of her cargo and ran up her colors for a tug. She picked up some shipwrecked sailors who were asked to assist the crew who were very tired. The services of a passing brig were declined: *Held*, that these sailors were not sailors, but should receive more than ordinary compensation.—*The C. G. Cranmer*, U. S. D. C. (Penn.), Feb. 29, 1888; 34 Fed. Rep. 405.

277. SHIPPING—Stoppage in Transitu.——When the vendor of goods on a vessel has exercised his right of stoppage *in transitu* while the vessel was out, the vessel is not liable in damages for refusing to deliver the goods to the vendee upon demand and production of the bill of lading.—*The Vidette*. U. S. D. C. (Ala.), March 20, 1888; 34 Fed. Rep. 396.

278. SLANDER.——To charge a married woman with unchastity is actionable *per se*.—*Rhoads v. Anderson*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 823.

279. SUNDAY—Delivery of Deed.——A deed signed and sealed on Sunday, but delivered on a succeeding secular day, is valid.—*Schwab v. Rigby*, S. C. Minn., May 14, 1888; 38 N. W. Rep. 101.

280. TAXATION—Collection of Taxes—Limitation.——A suit for a city tax instituted and prosecuted before the legislative act was passed, to carry into effect the provision of the State constitution directing the collection of taxes otherwise than by suit, operated to intercept prescription against the tax.—*Saloy v. Woods*, S. C. La., May 22, 1888; 4 South. Rep. 209.

281. TAXATION — Exemption—Municipal Corporation.——Lands outside of the limits of a city which were obtained by it in part satisfaction of money embezzled by an officer from the city, are not exempted from taxation, not being of the class of property belonging to municipal corporations which is so exempt.—*People v. City of Chicago*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 55.

282. TAXATION—Injunction — When Allowed.——An injunction to restrain the levy or collection of a tax cannot be granted before the taxing officers have taken any steps in the matter.—*Challiss v. City of Atchison*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 195.

283. TAXATION—Levy—Collateral Attack.——Once a tax is *in esse*, the tax-roll placed in the hands of the tax-collector, and the levying and assessing officers have become *functus officio*, the legality of the tax cannot be tested with the collector or alone, unless the assessment is void on its face or made in plain violation of law. The minutes of the proceedings of the board of commissioners of the fifth levee district are to be taken as of unquestionable veracity, and cannot be attacked in a collateral proceeding, to which the commissioners are not parties.—*Gaither v. Green*, S. C. La., March 26, 1888; 4 South. Rep. 210.

284. TAXATION — Tax deed — Setting Aside.——Construction of Illinois statutes relative to taxation, tax-deeds, setting the same aside and the reimbursement of the holder of the tax-title.—*Gage v. Pritle*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 34.

285. TAXATION — Tax-sale—Statute.—— Construction of Illinois statutes relative to taxation sales of land for taxes and the procedure thereon, irregularity which is held to be fatal to tax-title.—*Ogden v. Bemis*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 55.

286. TAXATION—Tenant in Common—Paying Taxes.——A tenant in common who has paid the entire purchase price, and is in possession collecting the rents and profits and not accounting therefor, is under no obligation to pay the taxes assessed to his co-tenant.—*Oglesby v. Holkster*, S. C. Cal., May 14, 1888; 18 Pac. Rep. 146.

287. TRESPASS — Tenants in Common.——Where a town has laid off and all the lots appropriated to individual proprietors except eight, which were held by the owners as tenants in common, one of those tenants cannot sue another in trespass *quare clasum fregit* for removing timber from one of the lots.—*Kane's, etc. Co. v. Garfield's, etc. Co.*, S. C. Vt., May 8, 1888; 13 Atl. Rep. 800.

288. TROVER AND CONVERSION—Waiving Tort—Suing on Contract.——When a person takes and sells the property of another, the owner may waive the tort and sue on the implied contract for the value of the same.—*Smith v. McCarthy*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 204.

289. TRUSTS—Fraud—Estoppel of Trustee.——A contract for the construction of a railroad as assigned in trust for a company, the trustees of which were also directors of the railroad: *Held*, that in an action by the stockholders of the construction company for an accounting, the trustees could not assert that the contract was in fraud of the railroad, nor that the stockholders had paid no consideration for the contract, and that the railroad was not a necessary party.—*Hazard v. Dillon*, U. S. C. C. (N. Y.), March 28, 1888; 34 Fed. Rep. 485.

290. TRUSTS — Resulting Trust. —— Circumstances stated under which it was held that no resulting trust could be established by the evidence produced in the case, there having been a conflict in that evidence and nine years having elapsed.—*Schneider v. Becker*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 31.

291. USURY—Agreement for Use of Money.——Where A agreed to pay off tickets issued by B, and in case the money was not refunded the next day B was to pay one and one-half per cent. per month, so much of the one and one-half per cent. per month as exceeds eight per cent. per annum is usurious.—*Burwell v. Burguyn*, S. C. N. Car., May 5, 1888; 6 S. E. Rep. 409.

292. USURY—Building and Loan Association.——In a case where a stockholder borrowed money from a building and loan association at a discount, with monthly payments, the contract was held not to be usurious.—*Thompson v. Gillison*, S. C. S. Car., April 23, 1888; 6 S. E. Rep. 353.

293. VENDOR AND VENDEE — Contract — Delivery of Deed.——A mortgagor agreed in writing to execute a deed to the mortgagee, and leave it in escrow, to be delivered upon his default in paying an agreed sum less than the amount due, provided the mortgagor gave a

receipt in full. He left the deed in escrow: *Held*, that the mortgagor was at liberty to withdraw the deed at any time before acceptance.—*McDonald v. Huff*, S. C. Cal., May 19, 1888; 18 Pac. Rep. 243.

294. VENDOR AND VENDEE—Notice—Option.——Where a lessee was given by agreement an option to purchase the property at a stated price within a limited time, the lessor reserving the right to sell to others if the lessee should not buy within ten days' notice of an offer to the lessor by a third person, such lessee failing to buy after receiving the prescribed notice looses his option and cannot sue for specific performance of the contract.—*Harding v. Gibbs*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 60.

295. VENDOR AND VENDEE—Purchase Money — Title. ——Under the facts of this case, held that vendor had tendered a good *prima facie* title, and the vendee must pay the contract price.—*O'Neill v. Douthitt*, S. C. Kan., May 4, 1888; 18 Pac. Rep. 199.

296. VENUE—Change of Venue.——In a circuit where there are three judges it is not error to refuse a change of venue because one of the judges is prejudiced against the party.—*Chicago, etc. Co. v. Perkins*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 1.

297. WATER — Appropriation — Canal. —— One who gives notice of an appropriation of water, has a reasonable time thereafter to complete his canal, and rights acquired thereafter are subject thereto.—*Dyke v. Caldwell*, S. C. Ariz., 1888; 18 Pac. Rep. 276.

298. WATERS—Water-courses—Obstruction.——A lower proprietor on a stream has no right to obstruct it so that it will set back on an upper proprietor and prevent the running of his mill.—*Richards v. Peter*, S. C. Mich., May 18, 1888; 38 N. W. Rep. 278.

299. WATER COMPANY — Municipal Corporation.—— Where, by statute, a corporation had a right to buy the property of a water company at a price to be fixed by commissioners, if the parties cannot agree upon the price, filing a petition for the appointment of commissioners, is sufficient evidence that the parties have not agreed.—*Braintree, etc. Co. v. Town of Braintree*, S. J. C. Mass., April 6, 1888; 16 N. E. Rep. 420.

300. WILLS—Acceptance of Devise—Waiver.——Where a testator devises real estate to his wife and bequeaths to others the proceeds of a policy of insurance belonging to her, her acceptance of the devise is a relinquishment of her interest in the policy.—*Huhlien v. Huhlien*, Ky. Ct. App., May 3, 1888; 8 S. W. Rep. 260.

301. WILLS — Construction — Adopted Child.—— An adopted child returned to its mother, and on the application of its mother and the adopting father the same judge set aside and revoked the adoption. The adopting father thereafter left his estate to his lawful heirs: *Held*, that the adopted child was not a lawful heir, within the meaning of the will.—*In re Session's Estate*, S. C. Mich., May 18, 1888; 38 N. W. Rep. 249.

302. WILL—Construction—Appointment.—— Circumstances stated under which it was held that by a will of a testatrix a fund, of which her husband held a life estate in one fourth of the personalty and landed interest besides, vested in her children, and became payable to them at his death.—*Appeal of Brown*, S. C. Penn., May 7, 1888; 14 Atl. Rep. 130.

303. WILLS — Construction — Devise. —— A devised land to his two daughters, A and B, during life, adding, that in case of A's death without an heir he wished her portion to go to B, or her living heir or heirs. B died first, leaving an infant son. A died without issue: *Held*, that B took a life estate only.—*Sutherland v. Lydnor*, S. C. App. Va., May 10, 1888; 6 S. E. Rep. 480.

304. WILL—Construction—Widow. —— A testator by his will devised his land to be equally divided among his three sons, and directed that his widow should be supported out of his proceeds until her death or remarriage: *Held*, that the widow's right was not affected by the partition of the land between the three sons, but remained a charge upon it all.—*Commons v. Commons*, S. C. Ind., June 13, 1888; 17 N. E. Rep. 271.

305. WILL—Delusion—Insanity.——Upon the trial of an issue as to the sanity of a testator, if it appears that he entertained a fixed prejudice against his son-in-law, such prejudice cannot be regarded as an insane delusion indicating his testamentary incapacity.—*Brace v. Black*, S. C. Ill., May 9, 1888; 17 N. E. Rep. 66.

306. WILL—Nuncupative—Public Act.——The notary is required by law, under pain of nullity of the act, to express specifically every material fact constituting the competency of himself and of the officiating witnesses, and also every formality observed in the execution of a nuncupative will.—*Succession of Volmer*, S. C. La., May 7, 1888; 4 South. Rep. 254.

307. WILLS—Probate—Witnesses.——When the attesting witnesses to a will are dead, their signatures may be proved by persons familiar with their handwriting. Under Alabama law, the proponent of a will, who is the sole devisee thereunder, is a competent witness as to the fact of its execution.—*Snider v. Burks*, S. C. Ala., May 16, 1888; 4 South. Rep. 225.

308. WITNESS—Defendant — Impeaching.——When a defendant in a criminal case becomes a witness in his own behalf, his credibility may be impeached by testimony assailing his general moral character.—*Lockard v. Com.*, Ky. Ct. App., May 1, 1888; 8 S. W. Rep. 266.

309. WITNESS—Transactions with Deceased.——Under Iowa law, on the trial of an issue as to the validity of a will, the daughter of a testator, being one of the contestants, is not a competent witness to prove conversations had with testator.—*Blake v. Rourke*, S. C. Iowa, May 24, 1888; 38 N. W. Rep. 392.

310. WITNESS—Transactions with Deceased.——In a suit by the administrator of the payee of a promissory note against the maker, her testimony as to the statements by the deceased, not made in defendant's presence, as to admissions made by the defendant, are not admissible, if objected to.—*Dolson v. De Ganahl*, S. C. Tex., May 4, 1888; 8 S. W. Rep. 321.

311. WRITS—Citation—Notice of Claim.——*Held*, that the citation did not sufficiently notify the defendants of the natare of plaintiff's claim, as required by Texas law.—*Miles v. Kinney*, S. C. Tex., May 22, 1888; 8 S. W. Rep. 542.

312. WRIT—Service — Jurisdiction.——If a person, a non-resident of the State, is served with process while temporarily within the State, the court acquires as full jurisdiction as if he were a resident of the State.—*Alley v. Caspari*, S. J. C. Me., March 7, 1888; 14 Atl. Rep. 12.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 5.

In 1887 the voters of a city of the third class in Kansas voted to issue bonds, not to exceed $30,000, for water-works. After such election it was discovered that the value of the city would only admit of $20,000 being issued, and these were issued. Now the value of the city will admit of the issuing of $10,000 more bonds. Can these be issued under the former election? Please give authority. S.

QUERIES ANSWERED.

QUERY NO. 1 [27 *Cent. L. J.* 27.]

In a Territory where the law recognizes "community property" a husband and wife entered into the following agreement:

"Received of John Doe, five hundred dollars, in part payment for lots 1 and 2 in the city of J, and we hereby

agree to make a deed for the same when presented with $600, being balance in full for payment of the above described property.

(Signed) JOHN SMITH,
JANE SMITH."

The memorandum is not under seal. There is no date specified when the $800 should be paid. Thirty days after the memorandum was made John Doe tendered the $600 and demanded deed, which was refused. He now files bill for specific performance and asks that Smith and wife make a conveyance. Has he a good cause of action? Can the chancellor compel the wife to join in the conveyance? She refuses, but tenders back the $500. The local laws require that the wife's examination be separate and apart from her husband, and that she execute the deed *freely* and *voluntarily*. The properity is community property. When, also, was the balance of the money, to-wit, $600, due? Give authorities.

Answer.—When a contract does not specify the time of payment, the law implies a reasonable time, and equity is still more lenient. Waterman on Spec. Perf. § 456, and cases cited. At common law, a wife's executory agreement to convey land, whether it is her own property or her husband's, is ineffectual, and cannot be enforced against her. Schouler's Husb. and Wife, §§ 98, 174. She can convey only as provided by statute, which is generally required to be strictly followed. *Idem*, § 451. So she cannot be compelled to join in the conveyance. Since this is community property, her signature is not necessary, nor would it add any increased validity to the deed. Pixley v. Huggins, 15 Cal. 127. L. J.

QUERY No. 3 [*27 Cent. L. J. 27.*]

A is the owner of a large tract of land. He contracts to sell it to B, a corporation, upon certain payments to be made. B subdivides the land into 10-acre lots and offers it for sale. C and D are friends and they verbally agree to buy jointly or as tenants in common two of the lots, each to pay one-half of all the several installments of the purchase money, the agreement also being that C shall take the contract with B in his own name. D advances his one-half of the first installment, C takes it, adds to it, pays B and takes the contract to purchase in his (C's) name. Thereafter D regularly tenders to C the one-half of the subsequent installments, but C repudiates the whole arrangement and claims that he is entitled to purchase the whole for himself. A still holds the legal title. Our code (Cal.) § 853, provides "when a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," and it has been held (38 Cal. 191), that when one pays a portion of the consideration a trust *pro tanto* arises. Since there has been no conveyance of the legal title to C, can D enforce any resulting or other trust? What, if any, remedy has he to obtain the land? Would equity treat a contract to convey land as a transfer of the title so as to raise the trust? To aid those who may be kind enough to answer, I will add I have found nothing directly in point in either Story or Pomeroy on Equity, or in Perry on Trusts. The New York cases cited by Brown on Statute of Frauds, § 84, do not directly apply. The only case which seems to be in point and which I have examined is the Maryland case, reported in 1st Am. Reports, p. 14. Please cite authorities. Lex.

Answer.—The authorities all agree that the trust must arise, if at all, at the instant the deed is taken and the legal title vests in the trustee, though the cases have generally related to payments made subsequent to the delivery of the deed. 1 Perry on Trusts, § 133, and cases cited. Such trusts "require for their subsistence, that the title and legal estate of the premises, which yield the aliment that sustains them, should reside, not nominally, but potentially in the trustee." White v. Carpenter, 2 Paige, 239. The Maryland case referred to (31 Md. 71) is clear on the subject. Under the facts stated, we cannot see that D can assert any interest in the land. W. T.

QUERY No. 4 [*27 Cent. L. J. 52.*]

Who are "tax-paying citizens" under the dram-shop license law in Missouri? (1) Is the last assessment list evidence of citizenship for this purpose? (2) Are poll tax-payers in towns of the fourth-class "tax-paying citizens" for this purpose? Please cite authorities. H. M.

Answer.—The amended law has removed the former uncertainties on these subjects. Those, and those alone, who appear on the last annual assessment can sign the petition. The last annual assessment list proves the qualifications of the signers. Sess. Acts Mo. 1883, pp. 86, 87; State v. Myers, 80 Mo. 601. E. J.

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His warmest welcome at an inn."

Rochester, N. Y.: Williamson & Higbie, Law Booksellers and Publishers. 1888.

"May I not take mine ease in my inn?" That depends. In this little work the author has very carefully collated all the circumstances which, in a legal point of view, tend to make or mar the full fruition of the enjoyment which a guest expects at a hostelry and for which he has paid his money. The author begins at the beginning, commenting on the ancient rules of hospitality "without money and without price," and bringing his investigations down to the most modern devices of sleeping cars and dining cars. The law governing the relation of host and guest under all circumstances to which such law is applicable is very clearly and accurately stated, the liability of the host for losses, damage and all the mischances to which the way-faring man is subject, and on the other hand, the kind and degree of negligence of the guest, or notice to him which will avoid that responsibility, are fully stated. The book is very valuable, especially in these latter days when men so generally run to and fro' over the face of the earth, and will, no doubt, be welcomed by the profession.